

Exhibit 408

United States of America ex rel. Ven-A-Care of the Florida Keys, Inc., et al.
v. Dey, Inc., et al., Civil Action No. 05-11084-PBS

**Exhibit to the August 28, 2009 Declaration of Sarah L. Reid in Support
of Dey's Opposition to Plaintiffs' Motion for Partial Summary Judgment**

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

CITIZENS FOR CONSUME, et al . CIVIL ACTION NO. 01-12257-PBS
Plaintiffs .
V. . BOSTON, MASSACHUSETTS
DECEMBER 4, 2008
ABBOTT LABORATORIES, et al .
Defendants .

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MARIANNE B. BOWLER
UNITED STATES MAGISTRATE JUDGE

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I N D E X

Proceedings 3

P R O C E E D I N G S

COURT CALLED INTO SESSION

THE CLERK: The Honorable Marianne B. Bowler
presiding. Today is December 4, 2008. The case of the Abbot
Wholesale Price multi-district litigation, Civil Action No. 01-
12257, et al will now be heard. Would counsel please identify
themselves for the record.

MR. DRAYCOTT: Justin Draycott, United States
Department of Justice, for the United States.

THE COURT: Thank you.

MR. HENDERSON: George Henderson, assistant U.S.
Attorney for the United States.

THE COURT: Thank you very much.

MR. DALEY: Good morning, Your Honor, Jim Daley on
behalf of Abbott Laboratories.

MR. WINCHESTER: Good morning, Judge, Jason
Winchester also for Abbott.

THE COURT: Thank you very much. Well, we're here
for a long morning. We have a series of motions to be heard
and I'm a little late, but it was my understanding that there
was some negotiations going on.

Well, we'll take the motions in the order in which
they were filed. So the first motion will be Docket Entry No.
5174, Abbott's motion to compel sufficient responses.

All right, Mr. Daley?

1 MR. DALEY: Judge, if I may. On our list we had
2 5112 as an earlier filed motion which is--

3 THE COURT: Okay.

4 MR. DALEY: --Abbott's motion to compel certain
5 testimony.

6 THE COURT: Oh, I'm sorry. Mr. Duffy, didn't list
7 them in numerical order.

8 THE CLERK: I did not.

9 THE COURT: Yeah, 5112 is - oh, I see. Okay.

10 MR. DALEY: Shall we do that one first, Judge?

11 THE COURT: We shall.

12 MR. DALEY: Okay.

13 THE COURT: Let me just, I have them all right here.

14 MR. DALEY: Your Honor, this is Abbott's motion to
15 compel testimony that relates to depositions that have been
16 taken where the government has instructed the witnesses not to
17 answer on the grounds of the deliberative process privilege.
18 And what we've done is there are many, many objections on that
19 ground. We are not moving on them all. Exhibit 1 to our
20 opening brief is the list of testimony and the instructions not
21 to answer that we are asking to be compelled.

22 One of the things we did earlier in the week, Judge,
23 was our view is that the lay of the land on the deliberative
24 process privilege has changed in light of Judge Saris' recent
25 ruling both in terms of releasing documents and some of her

1 comments. We filed with the Court a copy of the transcript
2 and a copy of the Judge's recent order. I have extra copies if
3 you need that. But essentially Judge Saris has made--

4 THE COURT: Maybe you can provide the law clerk with-

5 MR. DALEY: Certainly.

6 THE COURT: --a copy. It will be of assistance.

7 MR. DALEY: What happened, Judge, was that there were
8 certain, as I think the Court may be aware at least around the
9 edges, the documents were submitted to Judge Saris for in-
10 camera review. She went through them; found that the lions
11 share of the documents submitted weren't even qualified for the
12 privilege. They were not pre-decisional. They were
13 communications with third parties. They did not contain
14 information that ought to have been kept from us to begin with
15 and she released about two-thirds of those documents or three
16 quarters of them to us. And then we had a hearing and the
17 Judge has made it very clear that at least for discovery
18 purposes matters concerning what the government knew and
19 understood and believed at the various times in this litigation
20 is material that the defendants are entitled to to make up
21 their defenses. And so while this motion that we're talking
22 about today was filed before that, I think in the spring or in
23 the summer, subsequent events I think impact the rules of the
24 game. And so what we are taking the position on--

25 THE COURT: And have you discussed this with the

1 government since her ruling?

2 MR. DALEY: Yes, Judge. I've asked them--

3 THE COURT: Have you tried to narrow this at all?

4 MR. DALEY: I've asked them if they're willing to
5 move on any of this and they've told me that, at least on this
6 motion, they are unwilling. And so we have, you know, our
7 defenses for Abbott and the other defendants involved in this
8 matter are basically get to what did the government know and
9 understand? Did they have a policy relating to cross
10 subsidization? Were they aware of that? Did they allow it?
11 What did they know? What did they consider? What did they
12 look at? What did they reject? Did they look at ASP and say,
13 well, you know, we could do that but, you know, it'll mess up
14 the providers, it'll affect beneficiary access. All that sort
15 of stuff is on the table for us to learn in discovery and what
16 we have is situations where for the witnesses that we've
17 included in Exhibit 1 the government has simply come in and
18 when we've asked them what they were doing, did they have
19 meetings, was this issue discussed; we are getting instructions
20 not to answer. And so we're being foreclosed from the very
21 material that is essential to our defenses. And what we've
22 done is we've put some examples in our opening brief, they're
23 also repeated in Exhibit 1, but one of, you know, an example
24 that I think tells the tale on this motion is we have Mr. Vito
25 who is the regional inspector for OIG and he was the author of

1 many of the reports that are from the defendant's perspective
2 critical to the case; reports of OIG going out, doing surveys,
3 talking about how big the spread is, 66%, et cetera, et cetera,
4 and people ought to be decreasing the amount reimbursement.

5 He testifies in his deposition that there are these
6 entrance and exit meetings between OIG and CMS. When CMS goes
7 out to do an investigation they come in, they sit down with CMS
8 and they say here's what we're going to do and they talk about
9 the game plan. And when it's done before they make the report
10 public they have an exit interview where they sit down, talk
11 about their findings and recommendations. Now the government
12 has denied in their papers and in open court that they ever
13 paid any attention to what we call cross subsidization,
14 overpaying for the drugs because the dispensing and other
15 service fees were inadequate and letting the providers make up
16 the inadequate fees with overpayments on the drugs.

17 Mr. Vito testifies in his deposition that that very
18 subject was discussed on more than one occasion in these exit
19 and entrance interviews and meetings that he had personally
20 with CMS. So we get the yes answer, the yes we discussed that
21 and then we ask him, okay, please tell us what was discussed.
22 Instruction, not to answer, deliberative process privilege,
23 period. Now that is critical to our case. It's the thing that
24 they deny. They deny that they considered that, that they used
25 it in their analysis, that they dealt with it in any way, shape

1 or form. We've got a witness who says it was discussed. We
2 ask him about it. It's a very strong point for us and so - we
3 have other examples. I could go through them. Same
4 preliminary read is in the brief. These are the examples from
5 the brief, Judge.

6 In the brief he talked about cross subsidization. He
7 talked about CMS having discussions where they recognize that
8 the spreads on generics were much larger than the spreads on
9 branded drugs, which is an important feature in our defense
10 because all of our drugs are generics, and so while the
11 government had certain expectations with respect to what the
12 spread was on branded drugs, the expectation in our view was
13 much larger and, you know, 66, 80% when you come to the generic
14 field. He testified that, yes, yes, that's something we
15 discussed. We ask him, okay, tell us what you discussed.
16 Instruction, not to answer.

17 So we're being foreclosed on this and what's
18 happening is that in the briefs the government comes forward.
19 They don't make the case that Judge Saris has made very clear
20 that they have to make. They have to do two things. One, they
21 have to show that this material was covered in the first
22 instance by the deliberative process privilege. They have to
23 make a showing that it's pre-decisional, that it relates to a
24 particular decision that - and once they do that, which they
25 haven't done for any of these first of all in their briefs.

1 They don't even attempt to make that showing. And then the
2 second step of the analysis and the one that Judge Saris
3 performed when she did the in-camera review was, okay, if it
4 does apply then we have to do the balancing test. And the
5 question is is the government's interest in keeping this
6 confidential outweighed by the defendant's need for this
7 information to prosecute their defenses? They don't even take
8 a crack at that in their briefs.

9 So in our view the government has not met its burden
10 to come forward and show that this material is, first of all,
11 qualifies for the DPP. And secondly, that they can win the
12 balancing test, and for that reason we ask that we simply be
13 allowed to go forward and deal with the witnesses that are in
14 Exhibit 1. I can tell you it is fairly limited testimony.
15 Again, we haven't asked for everything. It is nine witnesses.
16 In the materials that I gave to your law clerks, Your Honor,
17 since this was briefed there's been a variety of depositions.
18 We've come up with only one more witness that we want to add to
19 it and that's in the supplementary materials. So it's
20 essentially 10 witnesses, a fairly limited set of questions and
21 because the government has not met their burden it's our
22 position that we should just be allowed to take those
23 forthwith.

24 THE COURT: Why shouldn't I grant your brother's
25 motion?

1 MR. DRAYCOTT: First of all, the motion has already
2 been denied and the, your decision on that motion was upheld by
3 Judge Saris on precisely the witnesses, precisely the
4 deposition transcripts that are before you now. Mr. Reed, Mr.
5 Vito, they were a subject of a motion that was Judge Saris'
6 November 9th ruling explicitly denied their objections to Your
7 Honor's rulings about the instructions given by the United
8 States to Mr. Vito and Mr. Reed at deposition. These are
9 precisely on point. Abbott just with respect to that issue
10 filed three briefs. Two of them covered other privilege issue
11 but also specifically asked that Your Honor could overrule the
12 objections stated in the instructions given to Mr. Vito and Mr.
13 Reed and other witnesses. They then filed a brief which was
14 wholly directed at the deposition of Larry Reed. They then
15 filed supplemental briefs with Judge Saris and she said among
16 the rulings all the objections and all their arguments with
17 respect to the instructions given to government witnesses were
18 denied. That's exactly on point. And so what they, the first
19 thing that respectfully that Abbott should have done is explain
20 that they were seeking reconsideration of issues that have
21 absolutely been decided here and that request should have gone
22 to Judge Saris.

23 THE COURT: What's your response to that, Mr. Daley?

24 MR. DALEY: Judge, I don't think that Judge Saris
25 dealt with these precise issues. And this motion that we're

1 talking about today was filed in the spring. So, I don't
2 think Mr. Draycott is correct in terms of what Judge Saris
3 ruled upon. I don't think she touched these particular issues.
4 And this has been pending since then and as I said the playing
5 field has changed with respect to what is in play on the
6 deliberative process privilege.

7 MR. DRAYCOTT: In my response to this motion, I laid
8 out the entire 11 briefs that have been filed at that time on
9 the deliberative process privilege. Docket No. 4474 they take
10 issue with instructions. There is a brief filed on October 1st
11 under seal which was submitted a final brief to Judge Saris
12 regarding its objections to the order of the magistrate judge.
13 Your supplemental brief took issue with the government's
14 instructions to Larry Reed and it was directly in front of
15 Judge Saris and she gave them no relief on it. And she said,
16 and I quote the ordered concluded with this statement, "That
17 the objections to the magistrate's order are otherwise denied."
18 She gave them a little bit of - she modified Your Honor doing a
19 little bit with respect to the categories of material, but
20 other than that they were completely denied with respect to the
21 objections that had been stated at deposition.

22 And again, it's a bit tedious to go through this now
23 but in our brief we laid out per docket entry every brief they
24 filed with respect to deliberative process privilege including
25 those which were specifically directed at instructions given,

1 the instructions that were given at deposition and which those
2 earlier briefs actually gave you the same transcript references
3 that are contained in this motion, the same testimony given by
4 Mr. Vito and the same testimony by Mr. Reed. Now granted
5 they've added some witnesses at the end that are going to be
6 easier to dispose of because they're outside of timeframe. So
7 the first thing I would say is that to the extent that they
8 want to renew the Court's inquiry on this issue it really ought
9 to be in the form of a motion for Judge Saris to reconsider an
10 order which explicitly overruled their objections or denied
11 their objections to the order of the November 7th that Your
12 Honor issued.

13 The next thing I have to say is that with respect to
14 deliberative process privilege there has been some, and this is
15 just by way of background, there have been hearings before
16 Judge Saris and an order issued by Judge Saris, on July 24th was
17 a hearing, November 13th and there's an order of November 5th.
18 However, the critical thing to understand is that Judge Saris
19 hasn't somehow thrown out the privilege or that she found that
20 we had asserted it where it was improper. In some certain
21 situations she found that we have properly asserted the
22 privileges and then she undertook the balancing test and
23 allowed disclosure. However, she has done that in an extremely
24 narrow category. And this is a relatively recent development
25 and may require a further briefing of Your Honor, but the only

1 place where she is even requiring us to sub - first of all,
2 there's whole categories of material that she's excluded. And
3 there's some important categories because they bear directly on
4 documents that have been submitted to you which are no longer
5 required to be reviewed in-camera. For example, draft OIG
6 reports. In the in-camera submissions we've made to you the
7 bulk of that material, in fact I think all of the material
8 except maybe two documents, are draft of OIG reports.

9 Judge Saris has explicitly said we don't have to
10 submit that for in-camera review. She said that on November,
11 excuse me, on July 24th. She absolutely explicitly confirmed
12 that we don't have to do that on July, sorry, November 13th.
13 And I can direct you to the point in the transcript, page 20
14 and page 21 of the November 13th transcript, and I took up the
15 issue of what we could exclude. And I said--

16 THE COURT: Page, again?

17 MR. DRAYCOTT: 20 and 21. Well, first of all, back
18 on November, I'm sorry, on July 24th she said that we don't have
19 to submit OIG drafts. She just outright excluded it as
20 something that we would have to submit. She said on page 25,
21 and I quote, these are her words exactly, "Skip the OIG
22 reports." She's talking about what we don't have to submit to
23 her for in-camera review. "I'm not going to require every
24 draft of every OIG report. That's ridiculous." And I'm
25 quoting Judge Saris. " That's classic big firm litigation."

1 The on page 26, "I'm not going to require some Judge to look
2 at every draft of every OIG report." That's what she said on
3 July 24th.

4 THE COURT: Some Judge.

5 MR. DRAYCOTT: I then came in on the 20th and I said
6 just for clarification, for example, one clarification I can
7 offer you that relieved us of a lot of the burden, this is me
8 talking, you've heard mention of the 42 documents that were
9 submitted to Judge Bowler but far and away the bulk of those
10 documents require, the bulk of those prior drafts - sorry.
11 You've heard mention of the 42 documents that we submitted to
12 Judge Bowler. But far and away the bulk of those is prior
13 drafts of final OIG reports. And then what Judge Saris said
14 unequivocally was - with the Court's indulgence--

15 PAUSE

16 MR. DRAYCOTT: Sorry. Page 39 and 40, I confirmed
17 the greatest bulk of boxes reveals certain drafts, the drafts
18 of the OIG reports and Your Honor excluded that the last time
19 we were here and it's still excluded. I think that makes it
20 easier for me. I think it also makes it easier for Judge
21 Bowler with respect to documents, and she said, the drafts, and
22 she agreed that these are absolutely excluded. That takes away
23 the bulk of the documents that are before you for in-camera
24 review. And there are two drafts that fall outside of that
25 description and it's absolute unequivocal that Judge Saris just

1 removed those. And I would just point Your Honor to the
2 transcript of November, I'm sorry, July 24th and November 13th.
3 And the documents that Mr. Daley is now alluding to or the
4 testimony that he's alluding to are entrance and exit--

5 THE COURT: Do you have the pages in the July 24th
6 transcript?

7 MR. DRAYCOTT: July 24th transcript is, the
8 statement--

9 PAUSE

10 MR. DRAYCOTT: Skip the OIG report is on page 25.
11 And then the discussion, I'm not going to require every draft
12 of every OIG report, the discussion of the OIG reports
13 continues onto page 26. The two places on - and then, Your
14 Honor, I can file a supplemental brief pointing you to every
15 point of the transcript where the OIG drafts were covered if
16 that would be more convenient for Your Honor, or I could give
17 you the citations now.

18 THE COURT: Yes, give them to me now.

19 MR. DRAYCOTT: Page 21 I talk about, specifically
20 about the material to be submitted to Your Honor. And then I
21 resume the, the discussion of this resumes on page 39. I,
22 again, make specific reference - yeah, November 13th, sorry.
23 And then I confirm that, what the Judge had said on July 24th
24 that our understanding was correct and she confirms that on
25 page 40. And that she generally said that with respect to

1 draft documents if we've submitted the final she didn't
2 require production of preliminary drafts. This is significant
3 with respect to the testimony that Mr. Daley just alluded to
4 because the entrance and exit or certainly the exit conferences
5 that are held are in the context of the draft reports for the
6 reports that are then prepared.

7 There's two elements to a report when it issues.
8 There's the OIG findings, recommendations, and then there is a
9 published - and then there is a final written response by the
10 agency to those recommendations that's then an appendix to the
11 report. So the result of that conferral, OIG's final
12 recommendations and the agency's response to them are in a
13 written final format that have all been publicly released and
14 have been available and they're just out there. And that's
15 generally a category of material where Judge Saris hasn't
16 required previous drafts.

17 What's more, in addition to the final drafts or
18 sorry, the final versions of both the report and the agency
19 response we have produced hundreds and thousands of pages of
20 work papers relating to the reports. Primarily the thing that
21 we have withheld from those work paper set is an extremely
22 narrow class of material which is the entrance and exit
23 conference notes which is just the conversations, the back and
24 forth between agency personnel about the format of that report,
25 what it's going to look like, properly deliberative process

1 privilege.

2 And what's more, the last point I'd make with respect
3 to this category of material relates to the process that we
4 began after November 13th. Abbott had asked for an appointment
5 of a special master which didn't occur that day but they
6 appended to that motion a schedule of privilege log entries
7 that they wanted in-camera review for. We then, there was a
8 fairly long colloquy on this issue. What the government agreed
9 to do and then Judge Saris ultimately said that she would
10 undertake personal review of all the material covered by those
11 entries for which the government would continue to assert
12 privilege. She then simply put it to me that she hated doing
13 in-camera review. She wanted me to go back--

14 THE COURT: There are two things judges hate to hear;
15 in-camera and pro se.

16 MR. DRAYCOTT: And I'll add my own name to that list
17 of people who hate that word now. And so we went back and we
18 have been reviewing all that material and she said whittle this
19 down to the stuff that you really care about. And so we have
20 since the 13th been in a rolling production of material from
21 this schedule that Abbott created of the privilege log entries.

22 THE COURT: And how much more do you have to produce?

23 MR. DRAYCOTT: And we've - we've taken off certainly
24 over 112 entries we released documents from. I think there's
25 slightly under 200 entries, 184. We released stuff from over

1 110. We're going to do another production from that. There
2 is however one core category of material for which we are going
3 to continue to assert privilege before Judge Saris and it is
4 the notes of the entrance and exit conferences. We're going to
5 argue to Judge Saris that those are similar to the drafts of
6 OIG reports, that they are part of that process. But this
7 issue of whether or not the OIG entrance and exit conference
8 notes that we produced is going to be squarely in front of her
9 within the week because I think, I suspect that when I finish
10 conferral with the agency and gone fully through this that the
11 category that will probably be left will be entrance and exit
12 conference notes and that the agency will continue to assert
13 privilege there.

14 So on a number of fronts I think that this, Abbott's
15 motion on this point is inappropriate. One, because exactly
16 the testimony of Mr. Vito and Mr. Reed that's presently covered
17 by this motion, the same exact transcript designation were
18 covered by prior motions and that relief was not granted. So
19 that I think takes care of it. The major defect with this
20 motion it should have been just Judge Saris, you know, you now
21 need to reconsider the decision in which you declined to
22 overrule the objection stated by government counsel at
23 deposition, and we have been stating these objections since,
24 you know, day one. And Your Honor's seen the briefing that
25 started back in February of '07 on these issues. So this isn't

1 something that's developed lately.

2 But the other important background piece of
3 information that I have is that with respect to the category of
4 material that Judge Saris is considering and weigh the
5 privilege it isn't any deliberative material. She's been very
6 specific. And this is described in specific places in these
7 transcripts and I can walk you through it there.

8 THE COURT: Okay. A couple of minutes because we
9 have a long agenda this morning.

10 MR. DRAYCOTT: But this is going to inform actually
11 Your Honor's consideration of a lot of issues today which is
12 the material that we were required to submit for in-camera
13 review or the material for which she's indicated she may look
14 at the balance and consider disclosure is going to be documents
15 which reflect the existence of mega spreads, you know, Judge
16 Saris' term for - now previously, I should back up a little.
17 Previously the categories of material that she requires
18 submitting for in-camera review were the spreads for Abbott's
19 drugs, or drugs in the complaint is actually I think how she
20 narrowed it, or the marketing of the spread and you may recall
21 there was some litigation over whether it was use of spread or
22 marketing of the spread. And so we had through several orders
23 by Judge Saris, and these were orders on Abbott's objections to
24 your orders which defined it as, defined the relative class of
25 drugs as being Abbott's drugs in the complaint.

1 Judge Saris in July expanded that arguably slightly
2 she said. But in some ways she narrowed it, in some ways she
3 expanded it. The focus - she was concerned that the government
4 was, might be asserting as damages payment for drugs that
5 included what she calls the 30% yardstick or speed limit. We
6 explained to the judge that wasn't the case. So after we
7 explained that she said, okay, what they get is documents which
8 relate to mega spreads and instead of going just Abbott's drugs
9 she included infusions and inhalants. Inhalants she included
10 because those are drugs that are at issue in the Day & Roxane
11 cases, not at issue in Abbott. These are drugs that are
12 delivered through a nebulizer and they are generally albuterol,
13 ipratropium bromide. So it's mega spread for infusions,
14 inhalants and the antibiotic Vancomycin which is in the Abbott
15 complaint. And she also said cross subsidization. And so she
16 said with respect to those issues that's where she'll look at a
17 document in-camera and determine whether or not even if they're
18 privileges that they'll be, whether or not the defendant's need
19 for the document outweighs the government's interest in
20 preserving it.

21 So it's not that she's thrown open the doors to any
22 and all deliberative process. And if Your Honor, this is
23 unfortunately the tedious part, but if you go through and which
24 I have done every single transcript designation in Abbott's
25 motion to compel the testimony of government witnesses, none of

1 them are specific to that issue. Mr. Daley alluded to the
2 issue of the government's knowledge of a difference between the
3 acquisition cost and AWP for generics. He argued that he
4 should be entitled to that information. He argued that point
5 to Judge Saris on, I think it was on July 24th and she
6 absolutely wouldn't give it to him. She said she wasn't going
7 to view it with respect to generics. And again, I can point
8 you to precisely the point where she denied him that relief
9 with respect to generic and it's just absolutely unequivocal.

10 On page, this is the July 24th hearing. We were
11 talking about specifically the issue I've just alluded to which
12 is what's the category of material. Is it infusions and
13 inhalants or is it broader than that. Mr. Daley said, and I
14 quote at the bottom of page - she said, so say it. "I don't
15 want any more briefing. Say the words." And this is to
16 establish the categories of material at the bottom of page 23
17 and Mr. Daley said, infusions, solutions, injectables. My
18 response was those were enormously broad because injectables
19 would cover too much. Then Mr. Daley said, and generics. The
20 Court, "No, not generics. Now you're going beyond." And then
21 further on in the middle of page 24, "Generics, this is where
22 you got me worried. I'm not doing it with generics." The
23 Court said, "I'm just not doing it with generics." She
24 excluded from the scope if there are just documents that talk
25 generally about generics without beyond specific to inhalants

1 or infusion drugs she's not requiring in-camera review of
2 documents and she's just not going to that level of generality.
3 And it's absolutely unequivocal on page 24 of the July 24th
4 hearing.

5 She didn't throw open the doors to any and all
6 deliberative process. It's narrow. And again, if you were to
7 go and I can, I don't think we have the time for it but we
8 could do it, every single transcript designation that they've
9 got is much, much broader. It's just general methodology, why
10 did you, you know, what was considered. None of it is specific
11 to the categories of information that the judge has said is at
12 issue here. So even if this were an open issue, and I don't
13 believe it is by virtue of the Court's prior rulings that are
14 exactly on point, there's no indication that the judge would
15 view this issue any differently if she was asked to reconsider
16 it.

17 THE COURT: All right. Mr. Daley, very briefly. I
18 mean, it sounds--

19 MR. DALEY: Very briefly, Judge.

20 THE COURT: Listening to both arguments it sounds
21 like we're talking about apples and oranges so--

22 MR. DALEY: Well I think we are talking about apples
23 and oranges because my brother is talking about what the
24 government was obligated to go and search for documents. And
25 they're saying, oh, Judge, if we have to search everything that

1 mentions a document in 20 years of documents that's going to
2 be overwhelming. I'm not asking for documents. That's -
3 whatever Judge Saris has decided on that front, she has
4 decided. I'm not asking for documents. I'm not asking for
5 draft OIG reports. That is a stretch.

6 What Judge Saris said is, and I'm quoting from page
7 24, she says, "Here's the problem, I remember being a lawyer.
8 We all remember. I'm sure you do this for attorney-client
9 privilege. You look at whether there's a plausible basis and
10 you assert it. Usually the first stab through most attorneys
11 over assert," as we believe the government may be doing here
12 and, "on the theory that, well, we'll chisel back. My problem
13 is I have to decide, A, if the privilege applies and then, B,
14 do a weighing. Okay. So I've got part B and I couldn't
15 entrust that to the government. In other words, the government
16 can't be the filter for what's relevant and what's covered as a
17 matter of law to just do that weighing. That's something I
18 think I have to do. And so since government knowledge is both
19 relevant to the various issues we've talked about, scienter,
20 reliance. There's a common law fraud claim. It's relevant to
21 the government knowledge defense. They may go down in flames
22 on it, but I can't say they can't have the discovery." That's
23 on page 23 and 24.

24 Now, I'm not asking for OIG reports and that's
25 another burdensome argument. In other words, if you've got the

1 final report do you really need every draft? And Judge Saris
2 is saying quite--

3 THE COURT: You're asking for the witnesses.

4 MR. DALEY: I'm asking for the witnesses to answer a
5 simple question. That's a completely different issue and it's
6 very narrow. There's nothing burdensome about it at all.
7 Judge Saris hasn't ruled anything with respect to this. And
8 when we talk about the documents that Judge Saris is dealing
9 with, we gave her a list of 200 documents from a privilege log
10 that has 1,500 documents on it. We said, Judge, we're going to
11 limit it to this. Since that hearing on November 24 the
12 government has produced to us like 115 of those. So in other
13 words they're not even sticking with what they put on their
14 privilege log. We've already gotten over half of them from
15 them because they were over designated to begin with. But
16 we're not asking for the documents. Judge Saris is either
17 going to do that herself or we talked in the hearing on the 24th
18 that the defendants are in favor of appointing the, a special
19 master and taking this off of both Your Honor's plate and Judge
20 Saris' plate and she seemed to be interested in that, but she's
21 going to take a look at whatever is remaining from that 200 and
22 make a decision about whether she's going to look at it or send
23 it to a special master. That's apples.

24 The oranges are we've got very limited testimony
25 about stuff. I mean my brother will stand up. He will, he

1 will deny that the government considered cross subsidization,
2 but I've got a witness who took the stand and said I talked
3 about that with CMS. And we ask him, what did they say? They
4 say, no. That's the kind of focused, narrow, inquiry that we
5 believe we are fully entitled to get and there's nothing in
6 Judge Saris' order that prevents that. The fact that she said
7 you don't have to give us all the draft OIG reports that's a
8 document issue. That's a burdensome of documents issue not a
9 focused deposition question.

10 THE COURT: All right. I'm going to take it under
11 advisement. Maybe I'll take a break and make some rulings and
12 then come back or else give you something quick electronically.
13 But let's move on.

14 MR. DALEY: Thank you.

15 THE COURT: The next is 5128 by my count which is the
16 government's motion to quash.

17 MR. DALEY: This is our motion, right Justin?

18 MR. DRAYCOTT: Pardon me?

19 MR. DALEY: This is ours right? We moved--

20 MR. DRAYCOTT: Yeah, I think so.

21 MR. DALEY: --or you moved for protection. Okay.

22 Judge, this is a related motion in the sense that we
23 have Mr. Bernie and I believe, Mr. Chang or Ms. Chang and these
24 are folks who work in the Office of Legislative Affairs within
25 CMS. We noticed them up for their deposition and rather than

1 get a deposition where we get to ask a question and maybe they
2 assert the DPP in which case it would be part of the prior
3 motion, they refused to put these people up. They just said no
4 how, no way, we're not even putting them up because we think
5 everything that they have to say is going to be covered by the
6 DPP.

7 We say well, I don't even know what that means
8 because the only way you can judge a privilege is to put the
9 person up and have them talk about it. And as I've stated one
10 of the reasons that Judge Saris has released so many documents
11 and why the government has released them to us is that a lot of
12 what they've kept out isn't even privileged and so to sort of
13 just bring the curtain down on these two people we think is,
14 you know, it's sort of one step beyond the motion that we just
15 argued. And I'll tell you that I deposed Tom Scully who was
16 the former chief administrator of CMS in the late 1990s and
17 early 2000s and he said of Mr. Bernie, and I quote from, it's
18 in our brief but he says that, Mr. Bernie, "was always the key
19 guy driving CMS internally" and that, "most incredibly complex
20 policies came from Bernie over the years, probably half of your
21 litigation," talking to me about the case. So here's a guy
22 that we say, okay, we'd really like to depose this guy since
23 he's the key driver of CMS over this time period. They won't
24 even put him up.

25 THE COURT: Briefly.

1 MR. DRAYCOTT: By way of background, it is important
2 to consider just the number of witnesses and this is not a
3 place, this is not a case in which the government has tried to
4 shut down, for example, testimony of ex-witnesses. We've
5 produced former administrators, multiple former administrators.
6 We have gone to the upper reaches all across, I mean to put it
7 on the corporate structure we've put in CEOs, executive senior
8 vice presidents, head of divisions, people who would be the
9 functional equivalent of in other words the head of divisions
10 or the functional equivalent of the highest level of corporate
11 witnesses. We have generally not sought to protect them and
12 they've been deposed for in many cases days and days and days.
13 In some cases, Larry Reed for example, for six days., Robert
14 Vito for four days. There were very few people who testified
15 for less than multiple days. We have sought protection for two
16 individuals and the most effective way to argue this to Your
17 Honor is just to refer you to the declaration--

18 THE COURT: Well you're saying you won't produce them
19 period?

20 MR. DRAYCOTT: Your Honor that is because there is
21 nothing that Mr. Bernie does except engage in this--

22 THE COURT: Well--

23 MR. DRAYCOTT: It's the Office of Legislation. He
24 doesn't go out and compile information. Again, the declaration
25 is what I would base this on is that he does virtually nothing

1 else but develop policy. That's his role. He's within the
2 Office of Legislation. He has no role in the administration of
3 this benefit. He is a--

4 THE COURT: No, I'll permit the depositions to go
5 forward. They can assert what they want, and you can instruct
6 them but I will permit--

7 MR. DRAYCOTT: Your Honor, could we get then a
8 limiting order with respect that, again, consistent with the
9 principles that have been articulated by Judge Saris in the
10 context of deliberative process litigation that the questioning
11 should be limited to those, to the scope that she has confined
12 us to with respect to documents.

13 THE COURT: No.

14 MR. DRAYCOTT: That is--

15 THE COURT: I'll leave it up to Mr. Daley to make,
16 formulate the questions that he wants and then you can give the
17 instructions that you want, but I'm not going to inhibit it at
18 this stage.

19 So 528 is denied.

20 MR. DRAYCOTT: Just one--

21 THE COURT: 5-1-2-8.

22 MR. DRAYCOTT: One follow-up on that issue, Your
23 Honor, discovery in this case was - well fact discovery is
24 closed with respect to Abbott and then further discovery of
25 state Medicaid officials is allowed to go through December 15th.

1 I think there's probably no way that we're going to get -
2 given all the depositions that are now ongoing of state
3 Medicaid officials, it's going to be I think impossible to get
4 those scheduled and done by December 15th and so I would just if
5 Your Honor could on the record indicate that the depositions
6 that were the subject of this motion can occur after December
7 15th.

8 THE COURT: Any objection to that, Mr. Daley?

9 MR. DALEY: No. I recognize that it is the holidays,
10 Judge, and--

11 THE COURT: All right.

12 MR. DALEY: --we'll work together and we'll do it
13 quickly though.

14 THE COURT: All right.

15 Next is 5156 which is the United States' motion for a
16 protective order regarding 30(b)(6) notices.

17 MR. DRAYCOTT: A colleague of mine is going to be
18 arguing that, Your Honor, thankfully.

19 MS. STRONG: Your Honor, Elizabeth Strong for the
20 United States.

21 THE COURT: Thank you.

22 PAUSE

23 THE COURT: All right, time is precious. Get to it.

24 MR. DALEY: Judge, if I may? One of the things that
25 we did on - we have worked out quite a bit on this in sense of

1 I've gone through these things, gone through the various
2 requests and limited them substantially and I've provided this
3 to counsel already, but this is a compilation of Exhibits A, B,
4 C were the letters between counsel where we listed the topics--

5 THE COURT: Uh-huh.

6 MR. DALEY: --and I've gone through and you can see
7 I've crossed out everything that we are no longer seeking with
8 respect to this, and so it limits it to about nine topics that
9 we need to deal with.

10 MS. STRONG: And, Judge, that's one of two
11 developments since we originally filed this motion. The other
12 is that we did produce CMS designees on the topics as we
13 drafted them, included them in the motion and in the draft
14 order, Your Honor, the topic designations were described in the
15 motion. So they've taken testimony from two CMS designees, Don
16 Thompson and Larry Reed, on those topics.

17 But if we could I guess focus on those I think it
18 might be 11 topics that remain, just focus our attention on
19 those, Judge, beginning with the first topic, topic one of the
20 November 20th letter. It's important, Judge, I think here to
21 focus on exactly what topic one seeks here. They want a
22 30(b)(6) CMS designee into the truth and voracity of the DOJ
23 lawyer that drafted the amicus brief or at least this portion
24 of the amicus brief and the first amended complaint. This is,
25 in effect it's a rehash, Judge, of something you've already

1 ruled on. In your May 22nd order you said that they could not
2 conduct deposition into that process because it's an attack on
3 the attorney-client privilege and for the same reason it would
4 be inappropriate here in a 30(b)(6) context.

5 THE COURT: What makes it any different now, Mr.
6 Daley?

7 MR. DALEY: Judge, we're specifically not asking for
8 a lawyer. I mean, if you read the statement they say in their
9 brief no governmental payer knew of or sanctioned Abbott's
10 conduct as set forth in this complaint. That's a factual
11 statement made in a brief. We're simply asking for a fact
12 witness, a 30(b)(6) witness at this point, to tell us what the
13 factual basis for that. If they don't have a witness who can
14 say that, we'll take that answer as well. But we just, it's
15 very, very narrow, very, very focused.

16 THE COURT: Do you have a fact witness you can
17 produce?

18 MS. STRONG: Judge, they've asked about the facts
19 under that issue of many 30(b)(1) witnesses. The facts
20 underlying that statement they've already inquired. What this
21 topic describes is a 30(b)(6) about the drafting of the
22 documents.

23 THE COURT: Well, are you telling me you don't have a
24 non-lawyer witness who could testify to that?

25 MS. STRONG: A non-lawyer witness but still about

1 attorney-client privileged information. It doesn't have to be
2 just a lawyer testifying to violate the privilege. If the
3 client, and it would be CMS that is doing the testifying at a
4 30(b)(6) deposition, they would be disclosing the attorney-
5 client privileged information, the communication between that
6 client and the attorney that drafted those passages. It still
7 seeks attorney-client privileged information, work product.
8 It's entirely privileged, Judge.

9 THE COURT: I'm inclined to agree on this one Mr.
10 Daley with the government.

11 MR. DALEY: Well, Judge, our position is that this
12 was the amicus brief that they filed that Judge Saris relied
13 on. They were asked to give the secretary's position and
14 understanding and they write, no governmental payer knew of or
15 sanctioned Abbott's conduct, i.e. it's deliberate manipulation
16 of published prices, et cetera, et cetera. We assume that
17 there's a factual basis for that. I mean, that's what they're
18 suing us for. So we're clearly not asking for a privileged
19 communication. In fact I assume that before you. I mean we
20 would never do that. I mean that would be a fool's errand.
21 We're simply asking for the factual basis for that statement.

22 MS. STRONG: Judge, they have a factual basis for it.
23 They - not just the documents and interrogatories and 30(b)(1)
24 testimony but this seeks 30(b)(6) testimony about veracity and
25 good faith basis representations made in this matter by the

1 Department of Justice.

2 And to address something Mr. Daley said earlier, he
3 said he was narrow and focused but it's not, Judge. It's
4 including but not limited to these two paragraphs that remain,
5 paragraphs B and F. So it would be the veracity and good faith
6 basis of every representation of factual allegation made by the
7 Department of Justice in this litigation. That's hardly
8 narrow.

9 MR. DALEY: I think when you read the, you know,
10 topic one and then we've limited it to sub-topic B so far,
11 Judge, so I don't think we're asking for everything plus B.
12 We're asking for B.

13 THE COURT: No, I'm going to stand by my ruling on
14 this one.

15 MS. STRONG: Turning, Judge, to topic two of the
16 November 21, 2007 letter, and I'm not entirely clear why,
17 Judge, this is still on Abbott's list because we produced Don
18 Thompson as a CMS designee on slightly modified but as I
19 understand their interest still getting to their interest in
20 the definition of AWP, this theory that AWP didn't really mean
21 the plain language meaning. And Abbott deposed Don Thompson in
22 March. The deposition was left open and they never asked for
23 that second day before the close of fact discovery. So it's my
24 understanding that they got what they wanted, the vast majority
25 of what they wanted in topic two so it's our position that they

1 - that's what we gave them, Judge, included in the topics.

2 THE COURT: What else is there?

3 MR. DALEY: Judge, we're in topic two from the
4 November 21 letter. Our problem with Don Thompson is we did
5 ask Don Thompson about this and he told us that if you want to
6 know how the secretary understood and interpreted this you have
7 to go read the Federal Register. That's not an answer for us.
8 Remember, Judge Saris asked them to file an amicus brief that
9 tells us what the secretary's position is and secretary's
10 understanding. They didn't tell Judge Saris to go read the
11 Federal Register. So we want a witness to testify to this.
12 And we do have one more day remaining with him but we've
13 already covered this material with him and they have refused to
14 put up a witness - this gets into the, an important distinction
15 between applied and interpreted. The question asks for how did
16 CMS over the years interpret and apply the term AWP. They say,
17 oh, we'll give you somebody that'll tell you how it was applied
18 because that's easy. They applied it 95% of AWP according to
19 the statute and the looked in the compendia. What the case is
20 about is what did you understand? This is whole government
21 knowledge. This is what, how did you interpret it? What did
22 you do? We understand you used 95% of AWP to reimburse under
23 Medicare but what did you understand AWP to mean? We don't
24 have a person to say that and for all of these, for - they talk
25 about we've had fact witnesses, 30(b)(1) witnesses. For each

1 one of those by the way I'll tell you, they make a speech and
2 say these witnesses are speaking only for themselves. They're
3 not speaking for the federal government. So that's why we've
4 gone with this 30(b)(6) route so that we can get the
5 government's position on this.

6 MS. STRONG: Judge, if I may respond? CMS's position
7 is what is in the public record. It seems like a lot of these
8 topics were drafted as if CMS was not a government agency that
9 was subject to the APA. CMS acts in its formal notice and
10 common rule making process. That process is that the documents
11 are public. It includes within those, comments from the public
12 and all the rationale that CMS has is in those documents. So
13 when Abbott seeks a 30(b)(6) deposition about CMS's position on
14 the rationale and for the regulations, that is the CMS answer.
15 Mr. Thompson's response is the CMS, the 30(b)(6) response to
16 those questions.

17 With respect to--

18 THE COURT: It may fly now but I don't think it'll
19 fly very well at trial.

20 MS. STRONG: With respect, Judge, to the difference
21 between applied and interpret, it's seems to be a distinction
22 without a difference. The way CMS applied the term AWP
23 reflected its understanding of the term AWP.

24 MS. DALEY: I think the government's position here
25 flies in the face of, you know, what I just read from Judge

1 Saris a couple weeks ago. We're entitled to know what they
2 knew and understood and that's all we're asking. And for them
3 to say go look it up in the Federal Register is a non-answer of
4 epic proportion.

5 THE COURT: I think Abbott's entitled to that to
6 prepare a defense.

7 PAUSE

8 THE COURT: So ruling in Abbott's favor on that.
9 Next?

10 MS. STRONG: Next, Judge, topic three, the manner in
11 which CMS, its agents, employee and the carriers interpreted or
12 implemented the term since the passage of the MMA in 2003, our
13 position, Judge, is that it's irrelevant but it's also been
14 covered actually Don Thompson. It was brought up in the Don
15 Thompson deposition back in March. But CMS's position is
16 what's in its public documents. To the extent that individual
17 employees or agents of CMS had interpretations that would be
18 irrelevant under *Lockman*. But the period at issue here is 1991
19 through 2001 and so after 2003, really it's 2004 and the period
20 thereafter is irrelevant.

21 THE COURT: What's the relevance of 2003?

22 MR. DALEY: Judge, are we talking about subsection B?
23 I think that we're talking about the Balance Budget Act of
24 1997. And we've always treated A, B together on this, Judge.
25 This is, our position is the same in terms of government

1 knowledge.

2 MS. STRONG: I'm sorry, I thought we had move on to
3 topic three.

4 MR. DALEY: Okay. Well, we had - all right, so the
5 Court's ruling is, prior ruling is with respect to all of topic
6 two. Okay. I'm sorry, I misunderstood.

7 MS. STRONG: Actually, Judge--

8 MR. DALEY: Judge, do the--

9 MS. STRONG: --I'm sorry--

10 MR. DALEY: I--

11 MS. STRONG: --I think Mr. Daley might be correct.

12 MR. DALEY: Well let's address this one because--

13 MS. STRONG: Okay, and then boot back.

14 MR. DALEY: --the relevance of 2003 is this, Judge.
15 Under the Medicaid Modernization Act, I know you've been with
16 us long enough to know that that came into play in 2003, '04,
17 '05. What they did is they moved Medicare to ASP plus 6%,
18 okay. And so that's what most drugs are now reimbursed on
19 under the Medicare program. Interestingly, our drugs are not.
20 Our four infusion drugs like water, salt water and dextrose
21 they still use AWP minus a percentage. And so here you have
22 it's the same question, you've got ASP right in the statute.
23 They're calling for actual sales price, average sales price in
24 the marketplace and yet they still are using AWP for our drugs
25 knowing that AWP far exceeds the price that you can actually

1 acquire it at. So this goes to that what is AWP mean now? I
2 mean you cannot say that AWP means the actual acquisition price
3 in the marketplace when you've got a statute that's directing
4 that all other drugs be reimbursed on actual average sales
5 price and still using AWP. So this goes to the position that
6 the government is taking with respect to what is the meaning of
7 this term. It can't mean ASP because ASP is already there in
8 Medicaid Modernization Act. So it simply goes to that question
9 where they have called out our drugs and said while the rest of
10 the world we're going to reduce everything and do ASP, we're
11 still going to reimburse infusion drugs or certain infusion
12 drugs at AWP minus, and we're exploring that. There's a whole
13 body of evidence that we've yet to develop with respect to that
14 because we haven't been able to get a full explanation of why
15 our drugs have been culled from the herd and still be
16 reimbursed at the very high AWP levels on purpose.

17 MS. STRONG: The answer, Judge, is in the public
18 record. The public record reflects as CMS has to do, it has to
19 be in the formal notice and rule making documentation. You
20 know it's related to my prior argument, Judge, that this is a
21 request for a 30(b)(6) deposition which is a CMS designee on
22 what CMS's position was on this question and those are
23 reflected in the public documents.

24 THE COURT: I'll let the deposition go forward.

25 MS. STRONG: Should we turn back? I think I may have

1 skipped over, Judge, with respect to topic two and your ruling
2 with respect to the term AWP, and I guess, with respect to your
3 ruling, Judge, there are I guess sort of two different versions
4 of topics A and B. There's the version on which the
5 depositions did go forward and these included in, the language
6 that is included in our motion. And then there's the language
7 used in this draft that Mr. Daley just gave you that is
8 slightly different but is your, does your ruling apply to
9 Abbott's language or is it in effect a granting of the
10 government's motion to allow it to go forward on 2(a) and 2(b)
11 as included, the definition included in the motion?

12 I'm not sure if I made that clear.

13 MR. DALEY: I'm not sure if I understand it.

14 THE COURT: You know I'm not sure if I--

15 MR. DALEY: I think we're moving on A and B and
16 they're very much the same. I think you've already ruled, on
17 2(a) and (b) I think the Court's already ruled.

18 MS. STRONG: And has the Court ruled on 2(a) and 2(b)
19 as drafted in the motion, the government's motion or as drafted
20 in Abbott's version?

21 THE COURT: As drafted in the government's motion.

22 MS. STRONG: With respect to D, Your Honor, this is a
23 request for a 30(b)(6) deposition on basically challenging an
24 interrogatory or excuse me, response to an interrogatory. And
25 - I'm sorry, if I could just have one moment. The quoted

1 language the response to that interrogatory was actually
2 amended and is no longer effective. It's therefore irrelevant,
3 Judge.

4 THE COURT: What's your position?

5 MR. DALEY: Judge, our position - the reason we want
6 to explore this is that they filed an affidavit that said that
7 the general concept that AWP refers to the price at which a
8 pharmaceutical firm or a wholesaler sells drugs to its customer
9 is commonly understood in the industry. So they took the
10 position in this written interrogatory response that that was
11 the common understanding. Then we asked them to verify it and
12 they took this sentence out, and so we find that very curious
13 that they come in, they file a formal document making a
14 representation in an interrogatory and then take it out. So we
15 simply want to ask is that because that's not a true statement
16 or is it because for some other reason? So we're entitled to
17 explore this. It's simply--

18 THE COURT: Yes, you are entitled to explore it.

19 MS. STRONG: Judge, if I might respond? What he's
20 getting to is privileged information. Why, I'm not sure--

21 THE COURT: Well, he's entitled to explore it. You
22 can raise your objection when you go forward but--

23 MR. DALEY: Judge, one point for verification on your
24 immediate and prior ruling. What I have in front of you is
25 what we are asking for, in other words through the parties

1 discussions it's 2(a) and (b) in the document in front of you
2 that we want to depose on, not what the government says in its
3 brief because this is the result of the negotiations so--

4 THE COURT: All right.

5 MR. DALEY: We want it to be that--

6 THE COURT: So--

7 MS. STRONG: Just to clarify, Judge, when he says
8 it's the result of negotiation the government hasn't agreed to
9 2(a) and 2(b) how he's drafted them. The government would
10 still for the language of 2(a) and 2(b) as drafted in the
11 motion.

12 THE COURT: Well, did you have some discussion
13 about--

14 MR. DALEY: Yeah, I mean this is - that letter is
15 attached as Exhibit A to their brief, Judge. I mean it's what
16 we told them we would want under this topic and that they've
17 refused to give us.

18 MS. STRONG: I did--

19 MR. DALEY: Now they're trying to - I'll tell you
20 what they're doing, Judge. What they're going to say, in our
21 brief we said AWP as, you know, Judge Saris defined it and
22 they're going to have some definition of it that is going to
23 make it difficult to get it--

24 THE COURT: Okay, A and B as it appears.

25 MR. DALEY: Thank you, Judge.

1 MS. STRONG: Pardon me. I just want to make sure
2 that I haven't left the Court with a misimpression that when he
3 says that he took this document that was attached to our motion
4 and just--

5 THE COURT: I've made a ruling.

6 MS. STRONG: Okay. I just--

7 THE COURT: I've made a ruling.

8 MS. STRONG: --want to make clear that the--

9 THE COURT: Let's move on.

10 MS. STRONG: Okay, Judge.

11 With respect to the topics, Abbott's topics that
12 address, the headline was continued use of AWP, Judge, it's
13 seven through 10. Judge, these topics for one thing they're
14 somewhat misleading because to the extent that government
15 knowledge is relevant in this matter it's where - if the
16 government had full knowledge and approval it's relevant to
17 defendant's scienter and it's knowledge specifically to
18 infusion drugs, cross subsidization, Abbott drugs or
19 Vancomycin, this is a point Judge Saris made I believe it was
20 November 5th, that is the context in which government knowledge
21 is relevant. The topics that are described here are not
22 relevant, Judge. They are not likely to lead to the discovery
23 of admissible evidence in that they are--

24 THE COURT: Well, that may be your opinion but that's
25 a question to be decided down the road I think.

1 MS. STRONG: And it really goes to, Judge, a
2 statement defendants made in their response brief in one of
3 their bullets that their view is that CMS may make deliberate
4 policy decision to pay inflated prices but again, it's drafted
5 as I mentioned earlier with a view that CMS is not governed by
6 the APA. Any CMS deliberate policy decisions are in public
7 documents. They are public matters. The 36(b)(6) deposition
8 will point to CMS public documents reflecting the notice in
9 rule making process that was the CMS decision making process.
10 They have the documents. They have 30(b)(1) deposition
11 testimony exploring the subject. It's really not relevant.
12 It also, Judge, goes to sort of questions of law. And so we
13 just think that they're improper as 30(b)(6) topics.

14 MR. DALEY: Judge, we're just trying to prove our
15 case and I think the passage I read from Judge Saris, you know,
16 maybe we'll go down in flames on some of our arguments, maybe
17 the government will.

18 THE COURT: Yeah, government's motion on this denied.

19 MS. STRONG: With respect to the Medicaid, Judge,
20 topics 16 through 18, Judge, I guess the points are similar to
21 those previously made. In fact, some of them are duplicative
22 of not only 30(b)(1) testimony but 30(b)(6) I believe was
23 touched upon by Larry Reed, the questions about the federal
24 upper limit or FUL. And--

25 THE COURT: Same ruling.

1 MS. STRONG: Same ruling. And with respect to the
2 final topic, Judge, topic 22, this, Judge, is entirely
3 duplicative of 30(b)(6) testimony that they already have. They
4 deposed Vicky Roby as a 30(b)(6) witness on document
5 preservation and production on March 20th. Marianne Bowman,
6 30(b)(6) designee on this topic June 5th. Joseph Brennan,
7 30(b)(6) deposition on this topic November 15th. Glenda Bailey,
8 30(b)(6) deponent on this topic. That's in addition to three
9 30(b)(1) deponents that were depositions conducted solely on
10 the issue of document preservation or production.

11 Judge, there's a First Circuit case called *Ameristar*
12 that speaks the question of multiple 30(b)(6) depositions.

13 THE COURT: What else is to be gained here, Mr.
14 Daley?

15 MR. DALEY: Judge, this is a, of all of them this may
16 be the narrowest. This relates to a letter - when the
17 government was investigating this case during the 10 years that
18 they had it under seal, they contacted the defendants to let
19 them know that they were investigating. The defendants did a,
20 negotiated with them, gave them a paper explaining their
21 position. Along with that, on March 17, 2000 the defendants
22 sent the federal government a letter saying please don't
23 destroy documents. We know you've been working on this case
24 for five years now, we may end up in litigation. You ought to
25 do something about preserving documents. And this - all we're

1 asking for here is what, if anything, did the federal
2 government, CMS, the Department of Justice, do in response to
3 that letter? And we've offered to let them give us a written
4 response. We're not trying to waste anybody's time. They can
5 give us a written response. They can just tell us. Maybe it
6 was nothing and if it's nothing, tell us. It goes to a
7 spoliation motion, it goes to a variety of things because there
8 are problems with the documents but very, very narrow. What
9 did you do in response to that letter, if anything?

10 MS. STRONG: I understand from Mr. Daley what it is
11 but what I don't see, Judge, is why these depositions hadn't
12 sufficiently covered that question. That letter is dated March
13 17, 2000.

14 THE COURT: Were there specific questions about this
15 letter in previous depositions?

16 MR. DALEY: No, Judge. This is the 30(b)(6) topic.
17 They objected to it.

18 THE COURT: All right, I'll allow it. I'll allow it.

19 MR. DALEY: Thank you.

20 THE COURT: All right. All right, does that take
21 care of that?

22 MS. STRONG: I think that's it for the motion, Judge.

23 THE COURT: All right.

24 MS. STRONG: Thank you.

25 THE COURT: Move on to 5173.

1 MR. WINCHESTER: Judge, this is Abbott's motion to
2 compel a few discrete categories of documents. Thankfully, I
3 can tell the Court that Mr. Draycott and I have talked
4 beforehand and I think for a couple of them we can at least
5 short circuit some argument today. Starting with these we've
6 listed the six categories right on the first page of our brief,
7 Judge. The first is a decision memorandum signed by the former
8 CMS head, Tom Skully on October 22, 2002. This particular
9 memorandum talks about the policies CMS is adopting and should
10 adopt for how it's going to review state Medicaid plans, you
11 know, in other words when are they going to disapprove of state
12 Medicaid plans for how they want to pay for drugs. And very
13 clear this document shows CMS' knowledge that the states which
14 are reimbursing at let's say AWP minus 10% or 15% were
15 reimbursing for far more than what everybody understood the
16 actual acquisition cost was. The document references an OIG
17 study that says for generic drugs, like those in this case, you
18 can buy those at an average of 66% below AWP. So it goes to
19 the government knowledge things we've been talking about today.

20 The government produced to us, you can see it's
21 Exhibit 4 of our papers the draft of this very decision in its
22 entirety. We've questioned numerous witnesses about it. When
23 we said give us the final, the one signed by Mr. Scully
24 however, they gave it to us and redacted almost all of it out.
25 You can see that. I think it's Exhibit 3. And we said, what

1 gives? They're trying to claim now a deliberative process
2 privilege over that. You know, from our standpoint as Mr.
3 Daley's talked to the Court about we think the deliberative
4 process privilege game has changed here. We certainly think
5 that this would be relevant. We should be able to get at it.
6 It is furthermore a final decision. It's not even
7 deliberative. It's a final decision signed by the CMS
8 administrator. But more to the point, Judge, this cat is long
9 out of the bag. They gave us the draft. We've got the whole
10 thing. We've questioned witnesses about it. They've sat
11 there. We've questioned numerous people about this document.
12 They want to now claim that that version was inadvertently
13 produced but that can't just hold. They haven't tried to get
14 it back. They've said it would be inconvenient to do so given
15 just how many people they distributed this thing to but that's
16 not a defense. They've allowed questioning about it. The
17 draft is out there. And certainly under any kind of balancing
18 there is no reason why we ought not have the full copy of the
19 final memorandum.

20 THE COURT: Why not?

21 MR. DRAYCOTT: Well, Your Honor, because, well, first
22 of all, there is a previous draft that was produced in the MDL
23 in response to subpoenas that were issued back in the '03, '04
24 timeframe. And so there was a very large production back then.
25 It was before the government was a party here and it was

1 disseminated too throughout the MDL at that time. That
2 document, the draft version, was used at a deposition and the
3 witness who it was shown to, a very senior CMS official
4 entirely of his own initiative immediately recognized the
5 privilege made for the document and then we, and another DOJ
6 attorney at that point recalled the document. We then, and
7 there was a, you know--

8 THE COURT: Cat is out of the bag.

9 MR. DRAYCOTT: And but - and so the, it ultimately
10 perhaps considerations we just couldn't get that cat back in
11 the bag because it had been out there long enough. However, we
12 would submit that with respect to deliberative process
13 privilege the same way for principles that apply other places
14 don't apply with respect to deliberative process privilege
15 because it's an executive branch privilege that the agency
16 exercises discretion in asserting the way the principles
17 certainly don't apply especially in a situation where the
18 government isn't trying to somehow make affirmative use of
19 certain information and then withholding other parts of it.
20 So there's nothing unfair in terms of what we're trying to do
21 here. We're not trying to use information over here and then
22 withhold information over here. This is the agency has an
23 important institutionally interest in preserving the integrity
24 of its deliberative function. The document has different
25 parts. There are parts - for the sake of convenience the

1 recommendations are laid out and then there is a part that
2 allows the administrator to simply sign off on the
3 recommendation and put the decision into effect. So there's
4 different parts of the document. We've released the part of
5 the document that reflects the decision of the administrator.

6 Now, I should say one more thing about this document.
7 This, at the present we are trying to re-review documents
8 withheld based on deliberative process privilege in the context
9 of the instructions and statements made by Judge Saris back on
10 November 13th. I think it's, my judgment is that it's, the bulk
11 of this document the agency will probably continue to stand on
12 its assertion of privilege. This would be a document though
13 I'd have to go back and probably revisit the redactions and see
14 if there were some parts of it that might be unredacted. I
15 don't want to given anybody here false hope that we're going to
16 produce the entire document, but there may be some parts of it
17 that we would allow out because the redactions were made, you
18 know, months and months before the hearings that--

19 THE COURT: All right, do that and then we'll go from
20 there.

21 MR. WINCHESTER: The second issue, Your Honor, has to
22 do with claim forms. We talked about this with Your Honor back
23 in July of 2007 effectively just saying this is a False Claims
24 Act case, give us the claims that you say are false. At the
25 time the government said we're rolling out a bunch of

1 information to them, data on false claims and everything else.
2 We'll let them see what they see. And Your Honor, you know,
3 quite rightly said let's see what happens then come back if you
4 don't like it. We got the data. I want to be fair to them.
5 They've certainly given us the data, the dollars and cents that
6 they claim were paid out for all of our products. What we're
7 looking for now is not every claim, just some, a representative
8 sample of the actual claim forms that they say were false in
9 this case. And part of what they come back and say in their
10 response is, we're in the electronic age now Abbott, wake-up.
11 This is all electronic and the data are the claims.
12 Respectfully, let's, first of all, we have a number of
13 witnesses who've testified that during this time period there
14 were paper claim forms. These HCFA 1500 forms that the Court's
15 heard a lot about, we ought to get some of those. Pick some.
16 You know, all we're asking for is let's say program by program
17 one a year for each of the drugs, for each of the NDCs at
18 issue, each of the J codes at issue on the sides. Give us a
19 sample so that we can take a look and say, here's a claim form
20 the government alleges is false. Let's go talk to who
21 submitted it. Maybe they can give us information about what
22 their practice is, whether they think it's false, and following
23 those things up. Even in the electronic age, and I'm not sure
24 that either Mr. Draycott or I know the exact answer to this,
25 but it's my understanding that even when we're talking about

1 electronic submissions as they do today, the data is not all
2 there is. There is an electronic claim form that would contain
3 some information. Maybe that's something we need to figure out
4 after this but at least it's our understanding that that's
5 there. If it is there then we want a representative sample.
6 If they want to come back and tell the Court as to the
7 electronic there's nothing more, we have nothing more to give,
8 that's fine. And as to the paper we used to have them but we
9 just don't have them anymore then fine, tell us that. But if
10 you've got it we want it on a limited basis, on a sample basis.

11 THE COURT: I think on a sample basis is perfectly
12 fair.

13 MR. DRAYCOTT: Well, Your Honor, just to make it
14 clear, there's nothing that we have that we are somehow
15 withholding and refusing to give. And, Your Honor, frankly I
16 had presumed that this part of this request was failed by now.
17 What the government had produced is not only all the claims
18 data that we've been talking about, we've given - the only edit
19 that we've run on any data would have been to just make sure
20 that we're giving Abbott claims data and that we're not giving
21 Abbott Day claims data or Roxane claims data.

22 THE COURT: Well, I've made a ruling. To be produced
23 on a sample basis.

24 MR. DRAYCOTT: Your Honor, I'm frankly at a loss as
25 how to respectfully, how to comply with it given that what

1 we've done is produce it. We've also produced the expert
2 report regarding our damage analysis. The gentleman's been
3 deposed already. There's going to be continued expert
4 discovery on the subject of damages and there is simply, we do
5 not currently have in our possession something that is a sample
6 of claims data. We would have to then--

7 THE COURT: Sit down Mr. Win - no, I don't mean now.
8 I mean sit down and work it out what it is you would like on a
9 sample basis.

10 MR. WINCHESTER: Okay.

11 THE COURT: All right.

12 MR. WINCHESTER: Sure.

13 THE COURT: After this hearing.

14 MR. WINCHESTER: We can do that, Judge.

15 The third item we talked about was a provider look up
16 table. The government has given us that so we can take that
17 off of the Court's docket. The next issue has to do with work
18 papers for a couple of OIG reports. They've produced to us
19 work papers for a number of OIG reports throughout this period
20 up to 2006, and we have questions about two specific OIG
21 reports. The first is in April of, or sorry, January of 2007.
22 And this is regarding the states use of new drug pricing data
23 in the Medicaid program. Specifically, OIG commissioned a
24 study to take a look at now that all these states are getting
25 AMP, A-M-P, the actual manufacturers' price, the average

1 manufacturers' price, are you using it? And they came to find
2 out that a number of them were not. And so this is pretty
3 similar to a study that they have given us from back in 2001
4 when the DOJ true AWP as the Court has heard about were out
5 there, they did a study to say, okay states, are you going to
6 use these? And as we found out through the work papers a lot
7 of states said no because they had concerns over what we talk
8 about as cross subsidization. They didn't want to put their
9 providers out of business. So we want to see with respect to
10 this report, OIG's taken a look, you got AMP now, are you using
11 it and if not, why not? And so they have this information.
12 It's not burdensome for them to give it to us.

13 The second issue is a report from January 2008,
14 very similar. It's taken a look at now that we have Medicare
15 Part D, cause we have prescription drug coverage, what is the
16 relationship between what we're paying and what the providers
17 are buying the drugs for. And this thing is fantastic. It
18 says the pharmacies are buying generic drugs, like the ones in
19 this case, on average at close to 75% off of AWP. And rather
20 than saying that's fraud, which is the position the government
21 advances here against Abbott, CMS' conclusion in this report is
22 to say we are pleased, that's a quote, pleased to see that the
23 AWP driven payments under Part D provide margins to community
24 pharmacies with respect to their acquisition costs. And it in
25 fact talks about the fact that where you've got spreads for

1 generics which are nine times higher than what you see for
2 brands, that's good for us systematically cause we want to
3 encourage providers to use generics. It goes directly to
4 everything we've been talking to the Court about today, their
5 knowledge of spreads, their use of and being pleased by
6 spreads. Issues that we think certainly go to government
7 knowledge and to negate that claim that you hear over and over
8 from them, had we only known what the real prices were we never
9 would have paid based on AWP.

10 MR. DRAYCOTT: Your Honor, with respect to OIG work
11 papers we have produced not just some work papers. We have
12 produced hundreds of thousands of pages. Although Abbott has
13 been rigorous in asserting a time based objection and not going
14 outside of the claims period in this case, we've actually
15 produced material from '01, '02, '03, '04, '05. At some point
16 we just have to say enough is enough. This is an '07 report
17 which, again, the first report pursuant to the Deficit
18 Reduction Act of 2005 CMS initially got authority to provide
19 AMP data to the states and they started to analyze something
20 that was permitted or they were able to--

21 THE COURT: Okay, denied as to this one.

22 MR. DRAYCOTT: And then the other one, I think
23 actually Mr. Henderson may have some comments there, but again
24 it's a 2008 report. At some point we have to put a reasonable
25 cap--

1 THE COURT: Denied. Next?

2 MR. WINCHESTER: The next one I think, Judge, for
3 document preservation memoranda we may be able to work through.
4 All we've asked the government to do is to tell us for all your
5 document preservation and collection memoranda have you either
6 given to us or logged them on a privilege log? And I talked to
7 Mr. Draycott about this this morning. I think they are
8 amendable to doing that, to telling us either they've done it
9 or they will do it and that's fine--

10 THE COURT: Reasonable.

11 MR. WINCHESTER: --if we can get that representation.

12 MR. DRAYCOTT: I think it's already done. It would
13 have been done by a different attorney other than myself, Your
14 Honor, but it certainly with respect to if we haven't given it
15 to them, if it's not already been logged, and I think it has,
16 then we'll--

17 THE COURT: All right.

18 MR. DRAYCOTT: --we'll log it.

19 THE COURT: So that's resolved.

20 MR. WINCHESTER: The final thing, Judge, just
21 concerns deposition transcripts that they have from other AWP
22 cases, and I'm a little embarrassed that we're even here
23 talking to you about this. The government came to us some time
24 ago and said, look, we want all the deposition transcripts that
25 you, Abbott, have in your possession from AWP cases where we

1 weren't there cause we don't want to go around trying to
2 figure out where they happened and tracking them down. And I
3 said, well, we might have protective order concerns, but I'll
4 make a chart for you of all the transcripts we got and you'll
5 then now for all the ones where it was just Abbott asserting
6 confidentiality under protective orders, I'll give you those.
7 And for all the rest where it was some party not Abbott making
8 confidentiality designation, you'll at least know who they are
9 and you can go approach them and see if you can work that out
10 and get the transcript. We've asked for the same thing from
11 the government. That's all we've asked. They say, forget it,
12 we're not doing it.

13 MR. DRAYCOTT: Your Honor, this is one where we -
14 there has to be clarification and it's important clarification.
15 With respect to the government's interest and what it asked
16 Abbott for that related to primarily discovery that was on
17 depositions given by third parties such as wholesalers, state
18 Medicaid officials and we absolutely agree that with respect to
19 discovery in this case that there should be a full sharing of
20 deposition material that the parties have so that we don't
21 burden third parties such as state Medicaid agencies,
22 wholesalers, anybody that is outside of this litigation and
23 we're certainly willing to do that. My understanding is that
24 there is a distinct category of documents which are problematic
25 here and that what Mr., what my colleague is asking for--

1 MR. WINCHESTER: Winchester.

2 MR. DRAYCOTT: I did actually know that -- is
3 depositions of other drug company defendants and that presents
4 a significant issue for a number of reasons. First of all, as
5 a question of general relevance is how is the conduct cited in
6 Abbott or Roxane or sorry, Day or Roxane relevant to the case
7 against Abbott? There are protective order issues that because
8 as Your Honor's probably aware the confidentiality and
9 proprietary information assertions have been consistent in this
10 case such that there is a phalanx of just confidentiality
11 concerns. This is also Abbott wants material from other
12 defendants. They've, you know, they certainly, they share a
13 database in terms of what the government is producing. They
14 ought to just be able to work that out between themselves. I
15 mean, the important consideration is I'm an attorney with the
16 civil frauds office, if I have depositions in my possession
17 there's a reason for that and it's a reason I really can't go
18 into, you know, because of seal considerations. And so with
19 respect to the request for this information we're already given
20 them and providing and in fact suggested that we share
21 depositions of third parties. We cannot and will not give them
22 a list of other testimony we're acquiring relating to just
23 other drug companies. We think it's irrelevant. They can go
24 get it themselves. There's this vehicle at the MDL if they
25 want to why don't - the question I put to Mr. Winchester is

1 does he want me giving Abbott the depositions of Abbott
2 employees to some other drug company. Can I give Abbott
3 depositions to Day or Roxane?

4 THE COURT: Well that's--

5 MR. DRAYCOTT: Well but it's related I think because
6 if he can expect that if he's going to object to that on
7 Abbott's, that you're going to get the same type of objection
8 from any other drug company that I might be dealing with.

9 MR. WINCHESTER: He's three, four steps down the
10 road, Judge. What we're asking for is the chart, the same one
11 that I made for them when they made this exam same demand on me
12 and called up and said, you know, Winchester we want this, we
13 want all these documents. At least give us the first step.
14 We're not saying we're ever going to get all these transcripts
15 but give us the first step knowing what's there. So that to
16 meet his claim that, you know, if some other drug manufacturers
17 got a transcript in their hands they either serve it as
18 confidential, I can go to them and say--

19 THE COURT: Well can you give it to him not including
20 anything sealed?

21 MR. DRAYCOTT: The sealed still wouldn't take care of
22 the concern about just investigations but the point is when we
23 asked for this information it wasn't to get information about
24 other drug companies from Mr. Winchester. It was to ease the
25 burden on third parties; people that aren't part of the MDL

1 aren't drug company defendants. So to suggest that we've been
2 demanding that Abbott produce, you know, material that they
3 might have gotten from another drug company it just isn't the
4 case. And--

5 THE COURT: Well, I don't see what the problem is as
6 to things that are not sealed.

7 MR. DRAYCOTT: Well - because the important
8 governmental concern here is it tells him frankly where
9 attorneys are looking and that is privilege work product. It
10 is, there is the governmental investigation privileges issues
11 and it's wholly irrelevant to the case against Abbott. If we
12 were to try to get, and I can't conceive of the circumstances,
13 but if we were to ever try to use that in this case, and I
14 don't see how we would, then we would have to disclose it just
15 in order to use it. so with that protection that if we were to
16 ever use it we would have to disclose it during discovery
17 there's no harm to Abbott here. All they're getting to is
18 access of what deposition transcripts an attorney in the
19 Department of Justice may want to acquire and that carries with
20 it just a lot of concerns and concerns that, and privileges and
21 governmental concerns that just aren't present with respect to
22 what Abbott has. But we're not, again, what we think we should
23 share is third party discovery so to alleviate the burden on
24 wholesalers, Medicaid agencies and the like. But there's
25 really no use here for the deposition testimony of other

1 defendants, especially when in the proprietary concerns that
2 are consistently expressed and thought--

3 THE COURT: Well, I just, I mean if the depositions
4 have taken place and they're not sealed--

5 MR. DRAYCOTT: Then they can go get, then Mr.--

6 THE COURT: --I don't see what the big deal is.

7 MR. DRAYCOTT: Then Abbott can go get those from the
8 party but they may not be sealed but--

9 THE COURT: Well, how do they know about them?

10 MR. DRAYCOTT: Because they're in the M - if they're
11 in the MDL they are a party to this MDL, they can ask the other
12 defendants and there are generally notices going on. The
13 problem is that there are generally--

14 THE COURT: Well, they don't have a vehicle to ask
15 the other defendants and get it instantly the way they do in a
16 request in a pending case.

17 MR. DRAYCOTT: I think this--

18 THE COURT: I will order it produced but not as to
19 anything sealed.

20 MR. DRAYCOTT: The list, Your Honor, or the
21 deposition transcripts?

22 THE COURT: Well let's start with a list.

23 MR. DRAYCOTT: I think that is the last item.

24 MR. WINCHESTER: That's it, Judge.

25 THE COURT: All right, time for the morning break.

1 We'll take a 10 or 15 minute break.

2 RECESS

3 THE CLERK: Resuming on the record, Your Honor, AWP
4 MDL litigation, Civil Action No. 01-12257 and others.

5 THE COURT: All right, going back for a moment to
6 Docket Entry 5112, as to Reed and Vito, I'm inclined to agree
7 with the government. That said, I direct you to further
8 consult and discuss each objected to question with respect to
9 each deposition in the context of Judge Saris' recent
10 deliberative process rulings and any related rulings on appeal
11 of my rulings. One option would be to provide written answers
12 to the objected to questions. In the event that you can't
13 agree you can renew the motion at which point I will consult
14 with either Judge Saris or her clerk and decide whether or not
15 she wants me to deal with it or she will deal with it. I don't
16 want to end up with inconsistent rulings here. I think this is
17 maybe a safer course.

18 Okay? All right, so we start with 5174.

19 MR. WINCHESTER: That's ours, Your Honor.

20 THE COURT: Right.

21 * MR. WINCHESTER: This has to do with a set of
22 requests for admission that we served on the government and
23 neither Ms. St. Peter-Griffith nor I has any interest I think
24 in walking the Court through 175 RFAs today, which I'm sure
25 will make you somewhat happy but my hope is that if you go

1 through some--

2 THE COURT: The only thing that will make me happy
3 right now is finding my Blackberry.

4 MR. WINCHESTER: There have been a lot of articles in
5 Chicago recently about our President-elect Obama being stripped
6 of his Blackberry now having a lot of issues--

7 THE COURT: One feels terribly insecure without it.

8 MR. WINCHESTER: What I hope to do with respect to
9 these, Your Honor, is to break them down into some categories
10 on which we have principal areas of dispute. And then maybe
11 with some guidance from the Court we can make some further
12 progress.

13 The first category as we've set forth in our brief,
14 Your Honor, and that I'll start with is the first 69 of these
15 RFAs where literally what we did is to take direct quotes from
16 government officials and congressional testimony and reports,
17 various things of that nature, documents we have, put these
18 direct quotes in an RFA, attach the underlying document where
19 the quotes appear and say, admit that this is a true and
20 correct document, that the statements were made at or near the
21 time and with information provided by a person with knowledge
22 and that it was kept in the regular course of business; your
23 basic stuff that RFAs are for getting the grounds of
24 admissibility in. And what we get back from the government is
25 a, literally ton of objections, no straight answers for these

1 which are just admit the person said it, it's quoted in a
2 document type of thing which we thought were easy lay up
3 questions.

4 Just as a couple of examples, Your Honor, if you look
5 at Exhibit B to our motion, it's actually the government's
6 responses to RFAs. So if you look at No. 24 we have a quote.
7 It says, "In 1990 the secretary of HHS, the head person,
8 testified before Congress that many studies," this is a quote,
9 "and most information available on this subject show that the
10 list prices for drug products commonly known as the average
11 wholesale process, AWP, rarely, if ever, reflect the prices
12 that pharmacies actually pay. Since 1976 our policy has been
13 that AWP is not an acceptable measure of EAC, estimated
14 acquisition cost." It goes directly to what we've been saying
15 about the government knowing that these two did not equate and
16 that AWP, which was the benchmark for their payment, was not in
17 fact an average of a cost anybody paid. That testimony is
18 there. All we say is admit it, admit that that statement was
19 made by a person with knowledge and we get a page of objections
20 and an answer that ultimately says subject to all of our
21 objections we admit with qualification because the document
22 speaks for itself and it's not really an admission against us
23 anyway.

24 So, you know, when we're suppose to have an answer
25 that says admit or deny we get the document speaks for itself.

1 And we've given you a lot of case law in our brief that says
2 the documents don't speak for themselves. That is an improper
3 objection to make in an RFA. We understand the government is
4 going to take the position ultimately that nobody has said
5 anything that can bind the agency. That's fine. They can make
6 that later when we're trying to offer these into evidence but
7 for purposes of now all we're saying is these are factual
8 statements, they are subject to being admitted or denied.
9 Obviously, all your objections to admissibility you can reserve
10 until later but we're entitled to a clean record on these
11 things so that we can try and introduce them. They're evidence
12 in the case. We need this to be able to do it.

13 Similarly again, if you look at No. 37, same thing,
14 we've got a direct quote from 95 from the chief of the Medicare
15 technical issue section talking about the fact that AWP is
16 different than estimated acquisition cost. And we get again,
17 the document speaks for itself and it's out of context by the
18 way. Again, Your Honor, admit it or deny it. You're going to
19 have your chance to challenge why it's out of context, why it's
20 not, an admission whatever that may be down the road but let's
21 at least clean this record up for these that are direct quotes
22 and say we admit it, we deny it.

23 THE COURT: Well--

24 MR. WINCHESTER: I don't know if you want to do these
25 categorically.

1 THE COURT: Yeah, it's easier to go one at a time.

2 MS. ST.PETER-GRIFFITH: Your Honor, before we get to
3 the, before we even get to--

4 THE COURT: Well, why don't you identify yourself for
5 the record?

6 MS. ST. PETER-GRIFFITH: Oh, I'm sorry, Your Honor.
7 Ann St. Peter Griffith, from the United States Attorney's
8 Office in the Southern District of Florida, on behalf of the
9 United States.

10 Your Honor, before we start going category by
11 category the United States has raised in its opposition the
12 issue of do we even need to do this right now. Rule 36
13 provides that this matter and objections can be deferred until
14 a later point in time at, closer to trial after dispositive
15 motions and motions in limine have been heard which will enable
16 us to avoid having to go through these sort of one by one
17 which, Your Honor, is--

18 THE COURT: Well it's an '01 case, I hope we're
19 pretty close to trial.

20 MS. ST.PETER-GRIFFITH: Yes, Your Honor, but there
21 are a number of matters that might be resolved on dispositive
22 motions that could substantially, substantially narrow the RFAs
23 that we're dealing with today, most notably the government
24 knowledge issue. In addition to relevance considerations there
25 are many, many documents and many RFAs in the RFAs that were

1 served that are completely outside of the time period of this
2 case. So we would just raise that before we go through it
3 category by category, Your Honor, that Your Honor consider take
4 up the issue of whether it makes sense to defer these until a
5 later point in time that is closer to trial because frankly
6 many of them might be resolved just through the course of
7 motions in limine and dispositive motions.

8 THE COURT: Well, it's a little too late with motions
9 in Limine, I mean this is discovery.

10 MS. ST. PETER-GRIFFITH: Well, Your Honor, I think
11 motions in limine in terms of ultimately what Mr. Winchester
12 was referring to was making a record to go into evidence at
13 trial. You know, we haven't heard from the defendant as to
14 which of these RFAs are going to be necessary for them for
15 purposes of summary judgment, if any. Many, many deal with the
16 public record. They can use the public record. We're just
17 going to go through, this could be a very time consuming
18 process, Your Honor, because each of these RFAs are separate
19 and Your Honor needs to make a finding as to the objections or
20 the, in instances where we've admitted the problems associated
21 with each RFA.

22 THE COURT: Any possibility of withdrawing this
23 without prejudice to be renewed at a later date?

24 MR. WINCHESTER: Judge, we thought about it and, you
25 know, we recognize this is a burden on the Court and we're not

1 interested in increasing your workload or the government's but
2 in fairness we served these a year ago. This is a case they've
3 been investigating since 1995 and, you know, when counsel says
4 let's put it off till trial cause maybe I'm going to beat
5 Abbott on summary judgment, well, in fairness--

6 THE COURT: Yeah.

7 MR. WINCHESTER: --a lot of these RFAs are admit you
8 knew AWP was higher--

9 THE COURT: Yeah.

10 MR. WINCHESTER: --than acquisition cost. That's
11 going to bear on summary judgment for us.

12 THE COURT: Well, I have to agree with that.

13 MS. ST. PETER-GRIFFITH: Judge, can we just sort of
14 try and further narrow the scope though? Can we just focus on
15 - one of our objections and it's a significant one because of
16 the number of RFAs that it deals with, there are a whole host
17 of RFAs that are outside the '91 through 2001 period of the
18 case, some going back to the early '70s.

19 THE COURT: Okay. Can we limit the time period?

20 MR. WINCHESTER: Well, Your Honor, I think the--

21 THE COURT: At least initially.

22 MR. WINCHESTER: Respectfully, I'd say, no, we can't.
23 Here's why, our--

24 THE COURT: You can't but I can.

25 MR. WINCHESTER: Well and you may. Your were just

1 asking me, Your Honor. We'll do what you'd like but here's
2 why I would say we shouldn't, how about that. Our position all
3 along has been you've charged us with a set of conduct, you say
4 we did bad things between 1991 and 2001. Okay, that's fine.
5 The Court's talked about you get discovery through 2003 on what
6 you allege to be the bad things Abbott did. Our point in
7 response and Judge Saris has said unequivocally, you are
8 entitled to run this to ground. I don't know if I'm ever going
9 to, you know, find your way on this but run it to ground is,
10 you government, have known about this not just over the time
11 period you're charging us with but back into the '60s, the
12 '70s, the '80s.

13 We have direct quotes from government officials in
14 charge of these programs that say out loud we know average
15 wholesale price is not a price people are paying and yet this
16 is what we're using to reimburse. So just trying to conscribe
17 their knowledge to this 10 year period is not going to give
18 anybody, including the Court at summary judgment, the full
19 nature of the government's knowledge of this which Judge Saris
20 has said we are entitled to discovery and to run to ground and
21 to make our best pitch to her about why this should defeat
22 their claims.

23 MS. ST. PETER-GRIFFITH: Your Honor, the burden
24 associated with going back in time for what we're talking about
25 and one of the reasons why we have objected so vigorously to

1 keeping to the timeframe that frankly applies to my brother
2 who are defending Abbott in this case they're very vigorous in
3 their assertion that this is a '91 through 2001 time period.
4 Verifying what needs to be verified for this RFAs, going all
5 the way back to the time period that they have is a significant
6 burden, Your Honor, and we think it maybe one of marginal
7 utility, but many, you know, a number of our objections go to
8 that issue so it is--

9 THE COURT: All right, it's allowed for the limited
10 time period '91 to 2001.

11 MS. ST. PETER-GRIFFITH: Your Honor, with regard to
12 the RFAs under category 1 there is one other topic, Your Honor,
13 a general topic that I think we need to address before we get
14 into the individual categories and that's the definition of AWP
15 which is another significant objection which affects all but 50
16 of the RFAs that are at issue here. Defendants would have us
17 use a definition that is not the definition that Judge Saris
18 has articulated. And our position is that that really puts us
19 in an untenable position because we're admitting to an RFA
20 using the definition that's not ultimately going to be used at
21 trial or for purposes of this case perhaps.

22 THE COURT: What's your response?

23 MR. WINCHESTER: Sure, Judge. They want to say well
24 you're using your own definition of AWP, we don't have to
25 answer to that. Our whole point here is and we are entitled to

1 get discovery from them that AWP being a price people actually
2 pay is not what they thought it was. That they thought AWP was
3 what was in the compendia. So when we present all these RFAs
4 to them and say, admit you knew that AWP published in the
5 compendia was not an average price anybody was paying they can
6 admit that or deny it. They don't get to change it around and
7 suggest well, Judge Saris said very early in this case AWP
8 ought to be read strictly as an actual average price. We're
9 entitled to the discovery to show that in fact that isn't how
10 the government understood it and the Court has said that. So
11 when we give them the RFAs they can admit it or deny it. I
12 mean it's easy for them to do.

13 THE COURT: I agree. I agree. All right, next?

14 MS. ST. PETER-GRIFFITH: Your Honor, if we could go
15 through the first categories to address what Mr. Winchester had
16 said, you know, we've asserted our objections--

17 THE COURT: I just have to tell you that my secretary
18 just found my phone.

19 MS. ST.PETER-GRIFFITH: Oh, terrific, Your Honor.

20 THE COURT: In Neiman Marcus.

21 MS. ST.PETER-GRIFFITH: Oh my. You know we have
22 answered to the extent that with regard to one through 69 which
23 address the time period that we're talking about, '91 through
24 2001, Your Honor, we've admitted whether or not the quote is
25 contained in the language. We've told them flat out these are

1 RFAs that go to the question of authenticity. We told them we
2 can work out authenticity. We're not going to object to
3 authenticity. So it's difficult, we preserved our objections
4 with regard to the documents but it's difficult to understand
5 where the problem is.

6 THE COURT: Well, are you willing to enter into a
7 formal stipulation on the record that you're not going to
8 challenge the authenticity?

9 MS. ST. PETER-GRIFFITH: Your Honor, I would have to
10 confer with my colleagues before I can say that.

11 THE COURT: Well before you make assertions like
12 that.

13 PAUSE

14 MS. ST. PETER-GRIFFITH: Yes, Your Honor, we can.

15 THE COURT: All right.

16 MS. ST. PETER-GRIFFITH: So, you know, it's difficult
17 to understand where the objection is because we've admitted in
18 some instances the language is misquoted. In some instances
19 it's spliced from different pages and put together and our
20 response reflects that. But to the extent that we can admit
21 that the language is contained in the document we admit that
22 the language is contained in the document. So it's difficult
23 to understand sort of what the concern is on the part of Abbott
24 with regard to the sufficiency of our response.

25 MR. WINCHESTER: And to simply - if you look at the

1 cases that we've cited, Judge, the Courts say you get a
2 request to admit, you admit it, you deny it. You don't say
3 admitted with the qualification the document speaks for itself
4 and is out of context. Those are not proper admissions. All
5 we're looking to do is have them clean it up and take out what
6 we would submit are the objections that are just not proper.
7 We're not saying that they're waiving their ability to contest
8 admissibility at least later but let's have you say at least
9 for a quote out of the document that we attached to an RFA for
10 goodness sakes we admit it was said, we admit it was said by
11 somebody with knowledge.

12 MS. ST. PETER-GRIFFITH: But, Your Honor, the problem
13 with that is if the document doesn't get admitted into evidence
14 the RFA can still be used. An RFA is admitted for all purposes
15 in a case. So what we have--

16 MR. WINCHESTER: So they can admit it--

17 MS. ST. PETER-GRIFFITH: So what we have is a problem
18 where it's the cart before the horse. We have documents that
19 they're quoting from that may never be admitted into evidence
20 but the quote may be. And that's a very difficult, you know,
21 judgment to make at this juncture, Your Honor.

22 MR. WINCHESTER: They can always admit them, Judge.
23 I mean if their point is you need more context, okay, fine.
24 Give us the admission that it says what we say it says cause
25 it's in there. It's a quote. And then you can later say; well

1 now you need to see the rest. Okay, fine, introduce it
2 yourself.

3 THE COURT: Allowed.

4 MR. WINCHESTER: Next category, Judge, and these are
5 very similar. We're on now items 144 to 173 and I'll give the
6 Court a couple of examples, but these are literally admit you
7 said what you said. So we've got documents, for instance let's
8 say No. 149, in or about 1984 HHS was convinced as the factual
9 matter that there was a significant discrepancy between AWP and
10 actual sales price. We've got documents that back that up, but
11 that's the factual proposition, admit it or deny it. And we
12 get, objections, we stand on our objections, no answer.

13 MS. ST. PETER-GRIFFITH: Your Honor, with regard to,
14 I'm sorry, Mr. Winchester--

15 THE COURT: That was 149.

16 MS. ST. PETER-GRIFFITH: 149, 149 is outside the time
17 period. That's in 1984. So, and I would tell you that we
18 stood on our objections with regard to those that were outside
19 the time period. I think if we move to I believe 166 within
20 this same category of documents, Your Honor, which, or 167 I
21 believe is the first one within the time period. With regard
22 to those we admitted with qualification or denied. The problem
23 is, is that Mr. Winchester has cited that these are quotes that
24 come from documents. We requested the documents that they come
25 from. If you just read the RFA it's not, the items are not in

1 quotes and there's no attribution to a particular document.

2 So our position is we admit that it's in the public
3 record but for the most part, Your Honor, there are some, you
4 know, we have to go one by one but for the most part we've
5 admitted that they may be in the public record but we defer to
6 the public record because we cannot admit to a paraphrasing of
7 a document that's not attributed anywhere. And, you know, so -
8 but we can admit to what's in the public record.

9 MR. WINCHESTER: Judge, for these - these are factual
10 propositions. We're stating facts. There is, we believe,
11 ample evidence to support these facts but these are conclusions
12 drawn from what we believe the evidence is. So when we put it
13 before them and we say, let's take 172, on June 13, 2000 the
14 HCFA administrators believed that on several occasions the
15 administration had unsuccessfully sought from congress the
16 tools necessary to ensure the system was paying actual price
17 rather than a contract price and that's a fact. Tell us, we
18 admit it, we deny it. And they give answers like, subject to
19 all of our numerous objections we admit that those statements
20 may exist in the record. Well, that's not an admission or a
21 denial. We're saying this is the conclusion we draw from the
22 evidence that's out there. It is a fact. You can say yes or
23 no, admit it, deny it, that this is what was the state of
24 knowledge of the organization that administered the programs at
25 issue in the case. They can do that.

1 MS. ST. PETER-GRIFFITH: Your Honor, I think when we
2 began this discussion concerning this particular category of
3 documents that Mr. Winchester attributed them as coming from
4 documents them as being quoted form documents and we have no
5 attribution, you know, that's why this particular - and, Your
6 Honor, for these we do have responses. So the question is the
7 sufficiency of the responses. At a minimum we need attribution
8 as to where this is coming from because, you know, we can make
9 a statement or they can pull a statement, paraphrase it from
10 the public record but outside of the context not understanding
11 where the context is that they're pulling that from it's very
12 difficult for us to, you know, say yes definitively X,Y, and Z.

13 MR. WINCHESTER: Judge, the first 69 were the ones
14 that were the direct quotes. These are just facts. This is
15 what RFAs are so we say factually here is a fact, admit it or
16 deny it.

17 THE COURT: Allowed. Next?

18 MR. WINCHESTER: Next issue, Your Honor, has to do
19 with a series of RFAs that we have that basically go to were
20 there laws in place that governed the conduct you're
21 complaining about here. So for instance if you look at our
22 request 105 we say during the relevant claim period time at
23 issue no federal statute or regulation required Abbott or any
24 other manufacturers to report prices to the publishers that
25 incorporated all distinct available to certain wholesalers,

1 distributors or purchasers of drugs. Admit there was no law
2 that required us to do that. And we get objections, they stand
3 on their objections. That's legal conclusions. Respectfully
4 we've got cases that say was there a law, is it in effect.
5 Tell us, was there a law there or not? They object and give us
6 no answer. And for all of these that fall in this category,
7 and there are a number set forth in our brief, they're all
8 basically like this. Admit that there was no rule. And if
9 they want to come forward and deny that, then fine. at least
10 we'll be able to pursue from them which rule do you say applied
11 here. Which rule do you say actually told us that we would
12 have to report to those publishing compendia prices that
13 include discounts? So they can tell us whether they believe
14 some rule required it or didn't.

15 MS. ST. PETER-GRIFFITH: Your Honor, if I could just
16 get a clarification so that we understand from the record which
17 RFAs we're talking about in this category. I have 72 through
18 85 and 87 through 109.

19 MR. WINCHESTER: I have 72 to 85, 87 and 88, 96
20 through 100, 105 to 109 and 142 to 143.

21 MS. ST. PETER-GRIFFITH: Okay. I just wanted to
22 understand the universe, Your Honor, of what we're talking
23 about here.

24 Your Honor, RFAs are about admitting facts. They're
25 not about drawing legal conclusions and, you know, it's our -

1 whether or not a statute exists saying does 42 CFR, you know,
2 Section 1937 exist that's a fact that can be denied or
3 admitted. Asking about whether or not X, Y and Z legally is
4 the case is a legal proposition and RFAs are not, that's not
5 the purpose and intent of an RFA is to draw--

6 THE COURT: Well--

7 MS. ST.PETER-GRIFFITH: --a legal conclusion.

8 THE COURT: Denied to the extent that it requires a
9 legal conclusion. Anything that requires a legal conclusion,
10 no, but allowed for the balance.

11 MR. WINCHESTER: And, Judge, I just point out Rule 26
12 but its text says you can use RFAs for the application of law
13 to fact. And we have plenty of cases in there that say the
14 existence of a statute - was there a statute that governs the
15 conduct you're alleging--

16 THE COURT: I've made a ruling.

17 MR. WINCHESTER: Okay. The next set, Your Honor, are
18 a few requests that concern the government's position about the
19 application of law to fact, exactly what Rule 26 talks about.
20 And these are, for instance let's look at one.

21 PAUSE

22 MR. WINCHESTER: If you look in 89 or 90, we're just
23 trying to get them to say what is your position here about
24 what's right and what's wrong. So in No. 89 we say it is the
25 plaintiff's position that a provider who submitted a claim for

1 payment to Medicare Part B or Medicaid for a drug knowing that
2 it would be paid at an amount that exceeded acquisition has
3 submitted a false claim under the False Claim Act. Could not
4 be more material to the claims they're raising against us.

5 No. 90 is just the flip side. It says, it's your
6 position that such a provider did not submit a false claim.
7 It's one way or the other. And they can tell us and what we
8 get are objections and not answers. These are application of
9 law to fact. Admit that under this circumstance, which they
10 are alleging in this case is false claim if anything, but we're
11 entitled to know and these are the types of things where
12 they're standing on objections and they will not tell us.

13 MS. ST. PETER-GRIFFITH: Your Honor, each of these
14 RFAs start with the, it is the plaintiff's position. The
15 United States position in this case is not a fact, that they're
16 asking us to admit that this is, this is what you're arguing
17 and that's not a proper purpose for an RFA. It's perhaps
18 appropriate for in the context of a contention interrogatory
19 which is what we point out to them but simply say and each of
20 them start exactly this way, it is the plaintiff's position
21 that. And we're at a loss frankly, Your Honor, to understand
22 what the purpose of these RFAs is other than to perhaps lock us
23 into a particular legal position which frankly might change
24 over the course of discovery.

25 The United States' position and legal argument can

1 evolve over the course of a case so simply to say it is the
2 United States position that and to have that as an admitted
3 fact, Your Honor, is we don't see the utility in that and it's
4 not a proper purpose for an RFA.

5 MR. WINCHESTER: Judge, the rule itself says you can
6 ask RFAs that apply law to fact. In terms of evolution we've
7 got 13 years of evolution here. I mean frogs could walk on
8 land in less time than they've had to evolve their theories.
9 They know what their theories are and so when we say it's your
10 position that it's this or that, yes or no, they can admit it
11 and the rule allows it.

12 THE COURT: I'm going to allow it.

13 MR. WINCHESTER: Last issue, Judge, are a series of
14 requests that go directly to government knowledge in the sense
15 that we say, look, one of the many ways, many, many ways in
16 which you knew that the published average wholesale price you
17 were using to reimburse wasn't what people really bought the
18 drugs for is you, government, bought the drugs at prices
19 substantially below AWP. So we give them requests that say for
20 instance No. 115, admit you purchased Vancomycin from Abbott at
21 X price. And what we get in response is, well we deny that
22 Medicare and Medicaid purchased it at that price. Well, that's
23 not an answer. We asked a question that said did you, the
24 government, purchase at that price. They don't answer the
25 question. And so we have a number of these like this that are

1 pure facts. It's in their capability to answer the question.
2 No dispute that these are factual matters and they won't answer
3 them.

4 MS. ST. PETER-GRIFFITH: Your Honor, if I could just
5 ask for clarification from Mr. Winchester so that we got a
6 clear record as to which--

7 MR. WINCHESTER: Certainly.

8 MS. ST. PETER-GRIFFITH: --RFAs we're talking about.

9 MR. WINCHESTER: I certainly can. I'm talking about
10 Nos. 112, 114 through 123, 125 to 128, and I believe also 142
11 and 43 is what I have.

12 MS. ST. PETER-GRIFFITH: Okay, Your Honor, with
13 regard to 112, we've already indicated that we would answer
14 that. With regard to those dealing with government purchases
15 our position is, Your Honor, that purchases under the federal
16 supply schedule, purchases by the VA is first of all incredibly
17 burdensome to place upon us to have to seek out that
18 information and it's wholly immaterial. This case is not about
19 the government purchasing drug products. It's about the
20 reimbursement programs of Medicare and Medicaid. We have
21 answered these RFAs to that extent. I'm not sure that each of
22 the RFAs that Mr. Winchester listed deals directly with the
23 government purchasing and frankly, Your Honor, I think we
24 probably - if I could just check.

25 MR. WINCHESTER: No, that's fair. They don't all,

1 Judge. There are certain of them like 127 if you look at it,
2 it says admit that during the relevant claim period in
3 connection with Medicaid--

4 THE COURT: Okay, can we narrow it to the ones you're
5 actually seeking.

6 MR. WINCHESTER: What's that?

7 THE COURT: Can we narrow it then to the ones you're
8 actually seeking.

9 MR. WINCHESTER: These are among the ones we're
10 actually seeking. Counsel pointed out that not every one of
11 these deals directly with government purchases--

12 THE COURT: Right.

13 MR. WINCHESTER: --and that is true. There are a
14 couple of these that are not directly on admit you bought the
15 drug at X price. And so I just wanted to make that clear.
16 There are some like you see in 127 that just says basically
17 admit that during the relevant claim period we gave you AMP
18 data, average manufacture price, and we get, and this is a good
19 one, we get admitted with the qualification that you only gave
20 us AMP in order to do the Medicaid rebates and everything else.
21 Again, that's one that we think is a lot more verbiage than
22 just what we're entitled to which is admit it.

23 MS. ST.PETER-GRIFFITH: Your Honor, our problem is
24 this. These are the types of questions that we're going to
25 have to go through category by category because we have

1 responded and the issue I believe is the sufficiency of the
2 qualification that we've provided and with each of these being
3 - we can't just sort of wholesale category say the response
4 isn't sufficient because there's a qualification to the answer.
5 We have provided an answer and the sufficiency I think we're
6 going to have to through one by one because we are committed to
7 qualify our answer to the extent that it is appropriate.

8 THE COURT: All right, I'm going to deny this one
9 without prejudice and come back to it if you feel you really
10 need it.

11 MR. WINCHESTER: Thank you, Judge. I think that's it
12 on this one.

13 THE COURT: All right. Then we move to 5179.

14 MR. GOBENA: Yes, Your Honor. Good afternoon, Gejaa
15 Gobena here on behalf of the United States. And I have some
16 good news to report which is that counsel and I have made
17 substantial progress in narrowing the issues that are, we need
18 to present to Your Honor.

19 THE COURT: All right.

20 MR. GOBENA: And I don't know if you want me to go
21 through the issues that we resolved, but I think--

22 THE COURT: No.

23 MR. GOBENA: --but I think we agree--

24 THE COURT: Done.

25 MR. GOBENA: Okay. We've agreed to memorialize it in

1 correspondence and we should be able to take care of that
2 after the hearing. There are really only three areas of
3 dispute here.

4 THE COURT: I just want to get the motion in front of
5 me.

6 MR. GOBENA: Sure. And--

7 THE COURT: I'm sorry, Mr. Gobena.

8 MR. GOBENA: No problem. It's 5179.

9 THE COURT: Yep.

10 MR. GOBENA: It's a motion to compel documents and
11 deposition testimony. And then the other motion is a motion
12 for the Court to order compliance with previous Court orders.
13 And actually both of them are interrelated. Actually 5609
14 which comes later on in your sheet is interrelated with 5179.

15 THE COURT: Well should we hear them together then?

16 MR. GOBENA: Yeah, we can hear them together. And
17 basically the cross over with those two motions deals with a
18 certain category of documents. We are seeking to take
19 deposition testimony from Abbott's sales force and these are
20 the people who are out there actually marketing and selling the
21 drugs at issue in this case. And there are two categories of
22 documents that we were seeking in particular. One were
23 personnel files that had sort of evaluations, sales goals, to
24 help us understand how these sales force people were
25 incentivized to sell the drugs. And then a separate category

1 were working files and these are the files that reflect their
2 day-to-day interactions with customers of Abbott. And I
3 mentioned earlier we made a substantial amount of progress in
4 resolving some of the disputes about that. And again, this
5 touches both 5179 and 5609.

6 Here's where we have some dispute. There are certain
7 former Abbott HVD employees whom we subpoenaed. And Abbott
8 actually agreed to represent those former employees I believe
9 because they're now working for a spin-off company called
10 Hospira that's also represented by Jones Day and they
11 represented them. And the subpoena called for documents. And
12 the witnesses provided documents and then counsel reviewed
13 documents and provided whatever they thought was responsive.
14 The issue that we have is that at least in one deposition in
15 particular a witness indicated that they provided a box plus an
16 eight inch additional stack of documents that covered personnel
17 files and their working policy, two different categories of
18 documents.

19 What was produced ultimately on that sales force
20 employees behalf was just 38 pages of personnel files. Now we
21 tried to go to counsel and figure out what exactly the criteria
22 they're using that would sift out thousands of pages of
23 responsive materials that seem to be relevant on their face,
24 working files is what the witness called it, they're unwilling
25 to provide the criteria. So our position is, why don't they

1 just produce all the documents to us, we can make a relevance
2 determination. These witnesses obviously thought they were
3 relevant otherwise they wouldn't have gathered them in the
4 first place. And that for the former people represented, you
5 know, by evidence that they be able to track down if they could
6 just provide the documents rather than filter because we don't
7 know what's being filtered out. So that's the first issue.

8 THE COURT: All right.

9 MR. WINCHESTER: Judge, with respect, do we get to
10 get behind all of their determinations of what should be
11 produced as responsive to all of our requests in this case?
12 That's just not how it works. They served subpoenas. We
13 represented the people and we told all these people, look, give
14 us everything you got, bring it all in. We'll take the task of
15 determining what's responsive and that's what we did. So to
16 have them come in now and suggest, well, we need to get behind
17 everything Jones Day did is a little offensive. It's not
18 normal ground rules.

19 They're certainly not offering to give us all the
20 documents let's say from OIG that they chose not to produce
21 cause they determined them to be not responsive and that's all
22 we did. People gave us documents that they collected and when
23 counsel says these people must have thought they were relevant,
24 in fairness there's no basis for him to say that. We asked
25 people give us everything you have and we will go forward and

1 make the determination of relevancy. So when they now say,
2 well we want everything that you guys decided was not
3 responsive there's no ground for that and it certainly not any
4 rule that's going to apply both in the case or any other case.
5 So we just think there's no basis for it.

6 MR. GOBENA: May I just briefly respond to that, Your
7 Honor?

8 THE COURT: Sure.

9 MR. GOBENA: The witness, for example the one witness
10 I'm talking about said that of the thousands of pages of
11 documents they produced of which only 38 were produced they
12 included his working files. Those are inherently relevant to
13 this case. It's back and forth with the customer--

14 THE COURT: Now which witness is that?

15 MR. GOBENA: This is a guy named Frank Janardi (ph).
16 And that's just one witness. But we don't know if this is an
17 isolated incident or symptomatic of a larger problem in which
18 very restrictive search criteria or sorry, filtering criteria
19 were used, and we're not questioning the integrity of counsel.
20 I, frankly we just would like, A, to know what the criteria
21 was. And we've actually had conversations with Abbott when
22 they asked what criteria does the government use in searching
23 for documents and collecting them. I don't see why at least
24 the transparency can't be offered. And secondly, for that
25 particular witness, why not just produce those documents? It

1 seems like there's a lot more work involved in filtering--

2 THE COURT: Well are you willing to produce it for
3 one witness, for this one witness as a sample?

4 MR. WINCHESTER: The materials that we combed
5 through? Your Honor, I guess I'd have to go and ask the client
6 about that. He raises this; let me say I didn't go through
7 those documents personally. I don't really know what was in
8 there. You're talking about people in 2008 who are being
9 deposed so when they bring a bunch of things in you got five
10 years at least worth of things outside of the period. So--

11 MR. GOBENA: Well, this witness was specifically
12 identified in the motion papers, Your Honor, so there's been -
13 it's a witness that we've actually specifically--

14 THE COURT: Yeah, I realize that.

15 MR. WINCHESTER: So it's in there, Judge. But the
16 idea that you can equate when a witness says I brought in a box
17 of stuff with it must all be relevant, it doesn't hold.

18 THE COURT: No, I agree with that.

19 MR. GOBENA: I mean, but certainly they're talking
20 about working files, the files that they used to interact with
21 their customers. How's that not relevant? I mean, I'm not
22 understanding what the filter is that was being applied to sort
23 out working files and that's the concern. I think we're not
24 questioning again that, you know, the integrity of counsel.
25 All we're saying is, okay, when a witness says they provided

1 thousands of pages of working files and ultimately those
2 weren't produced, well those are inherently relevant. We'd
3 expect those to be produced. And, I mean I think Your Honor
4 has come up with a reasonable solution which is okay, provide
5 those working files that were withheld from Mr. Janardi and
6 then we can revisit the issue later on if they'd like.

7 THE COURT: All right, I'll permit it to that scale.

8 MR. GOBENA: Thank you, Your Honor. The second issue
9 relates to a category of depositions that still, we're still
10 talking about these sales force personnel. Your Honor, I think
11 you need to understand some important background context.
12 Something like two-thirds of Abbott's document production in
13 this case came after the close of fact discovery. We're
14 talking about 2.2 million pages of documents after fact
15 discovery was closed, after we're supposed to have done our
16 depositions in this case.

17 Within those documents one of the categories of
18 documents that they produced or included some documents relates
19 to these sales force working files. And so what we asked for
20 in our motion is the opportunity to on a limited basis re-open
21 or commence a few depositions and I have a proposal for a
22 number that, you know, to keep things within control,
23 depositions based on the late production. In addition to the
24 late, sort of the post fact cutoff production, there's also
25 another area of dispute that I think we worked out but is

1 relevant to this which is Abbott had several--

2 THE COURT: What are you looking for specifically?

3 MR. GOBENA: Basically, the ability to reopen or open
4 five depositions based on late production of documents.

5 THE COURT: It's late in the game. I'm really not
6 happy about more discovery at this point.

7 MR. GOBENA: I understand, Your Honor, but it's not a
8 function of our, it's not something that we, a problem that we
9 created. There's two reasons. One is the late production and
10 we've had a dispute over whether or not Abbott was going to go
11 to its former employees and collect working files from them.
12 They said they're not obligated to. We recently reached, made
13 an agreement where we said, okay, can you give us the contact
14 information and then we'll go find these people and ask for the
15 files and provide you whatever they provide us so that both
16 sides have the same information.

17 What if it turns out in those files there's some
18 highly relevant information that, you know, because of this
19 dispute that only got resolved now we have access to and like
20 to question the witness about? You know, there are a lot of,
21 there's 153 sales force people. We're only asking for five.
22 It's a very narrow limited request and it may very well be that
23 we don't need to take those depositions but we'd like to have
24 that limited option to do that.

25 MR. WINCHESTER: That's a lot of what ifs in there,

1 Judge. First of all, we did not produce documents out of
2 time. the Court extended the discovery period and our
3 documents were produced. They can't come here today and tell
4 you who they want to depose. They just want some blanket
5 authority to go and maybe re-depose people they've already had
6 or get some new people that they, but they can't tell you who
7 they are now. So I think at best this is not right.

8 THE COURT: No, I think unless you can be more
9 specific at this time it's too vague. Denied.

10 MR. GOBENA: All right. Your Honor, the final issue
11 relates to the deposition of two former Abbott executives,
12 Dwayne Burnham and Thomas Hodson. Dwayne Burnham was the
13 former CEO of Abbott and Thomas Hodson was the former chief
14 operating officer. The reason why we want these depositions is
15 that these people have personal unique knowledge about the
16 issues in the case.

17 Let's start first with Mr. Burnham. Mr. Burnham was
18 the CEO. We have documents in evidence that we submitted in
19 previous briefings that establish that he was directly involved
20 in the formulation, approval and advocacy of Abbott's position
21 on AWP and government reimbursement policy. He actually went
22 and interacted with Congress people about reimbursement issues.
23 He was consulted by his subordinates about what Abbott's
24 position was ultimately going to be on AWP and government
25 reimbursement. And why that's important is that there's some

1 legislative developments during his tenure where Congress is
2 looking into ways to reform AWP based reimbursement.

3 THE COURT: But you're just figuring that out now?

4 MR. GOBENA: Sorry?

5 THE COURT: You're just figuring this out now?

6 MR. GOBENA: I'm sorry, figuring out what, Your
7 Honor? I'm confused.

8 THE COURT: Well, I mean why wasn't this person
9 deposed earlier?

10 MR. GOBENA: We tried to depose them and, Your Honor,
11 they asked for a motion for a protective order and you granted
12 it on a limited basis. You said, they said there are going to
13 be 30(b)(6) depositions that would cover their knowledge,
14 activities, what they engaged in. We took those depositions.
15 I can read you from the transcripts, none of the witnesses were
16 prepared at all to testify about these people. These witnesses
17 knowledge none of them were willing to testify, able to testify
18 about their activities. They were unwilling to provide
19 anything or unable to probably is more accurate to put it. The
20 only way to find out about their personal knowledge and
21 activities, and they are directly involved with the issues in
22 this case, is a deposition. The 30(b)(6) that Your Honor
23 offered as an alternative didn't work.

24 In addition, we actually did object to your Honor's
25 original order and Judge Saris--

1 THE COURT: When was the 30(b)(6)?

2 MR. GOBENA: Sorry?

3 THE COURT: When was the 30(b)(6)?

4 MR. GOBENA: The 30(b)(6)s happened earlier this
5 year.

6 THE COURT: When?

7 MR. GOBENA: I believe in March.

8 THE COURT: And when was this motion filed?

9 MR. GOBENA: This motion was filed March 31st, soon
10 after the depositions took place.

11 THE COURT: Okay, soon after. All right.

12 MR. WINCHESTER: Judge, if I may. If this sounds
13 familiar it's because you've already ruled on it.

14 THE COURT: Yeah, yeah.

15 MR. WINCHESTER: There's nothing, there's nothing new
16 that has happened that requires any kind of different result.
17 First of all, this Court ruled that these depositions would not
18 go forward. They were permitted to go ahead and take the
19 30(b)(6) depositions. At the hearing on 1/31, January 31
20 counsel for the United States, Mr. Breen said, Judge, I
21 understand you denied the ruling, our ability to get these
22 people now. Can we modify the 30(b)(6) request to ask these
23 30(b)(6) witnesses what was in these individuals' mind? The
24 Court said, no. Why? Because we're already past the end of
25 discovery and you told them you have to work with what you've

1 got. So this notion that these witnesses didn't know what Mr.
2 Hodson or Mr. Berman were thinking, you had already ruled on
3 that. That's already been affirmed. There's absolutely
4 nothing here.

5 When we talk about what these witnesses knew or
6 didn't know on the 30(b)(6) side with respect to lobbying which
7 Mr. Gabini was talking about, they had four fact witnesses, two
8 30(b)(6) witnesses, six witnesses all tolled, about 10 days of
9 testimony. When you look at their brief as to what they say
10 they thought they might need, it's all about the question of
11 they asked the witness, do you know what Mr. Berman thought
12 about that? The witness said, no. Well, there's a reason for
13 that. You told them that they didn't have to be prepared on
14 that.

15 So there's absolutely nothing new with respect to
16 either one of these witnesses. With respect to Hodson, Mr.
17 Hodson, the only thing they cite as a reason they'd like to
18 talk to him in their brief is he was a witness in another case
19 who testified about the corporate relationship between Abbott
20 and TAP and we've been around this block before too. As this
21 Court has held on a number of occasions the, TAP case has
22 nothing to do with this case that's here. So they still have
23 to make their showing. You've already ruled on it. Judge
24 Saris has already affirmed you. The one thing she disagreed
25 she let them take Mr. Gonzalez' deposition, the president of

1 the HPD, the hospital products division. That's already gone
2 forward. And they've had 10 days of 30(b)(6) deposition on the
3 subject and there's nothing in their brief other than what,
4 exactly what you told them would not be the proper subject of a
5 30(b)(6) deposition.

6 MR. GOBENA: Your Honor, if I may address my
7 brother's comments real quickly. First of all, these witnesses
8 have demonstrated document involvement in the issues in the
9 case. The 30(b)(6)s were meant as a way to provide insight
10 into that, into whatever their role was in the case. None of
11 the witnesses could testify about that. I can read you from
12 various witnesses, 30(b)(6) witnesses. Mike Sellers who was
13 offered on a variety of topics was asked the question, in
14 preparing for today's deposition, the 30(b)(6), did you do any
15 inquiry to find out what involvement was of Tom Hodson in any
16 of the topics that are at issue in today's deposition?
17 Objection to form. Answer, no. What about Dwayne Berman?
18 Answer, no. These witnesses did not even remotely try and
19 prepare themselves to address the factual information that
20 might be directly in possession of these two former executives
21 who have documented knowledge of the issues of this case. And
22 what's more, Mr. Berman's all over memos that
23 deal with AWP and government reimbursement issues. He
24 obviously was involved in the company's formulation of that
25 policy. That directly goes to scienter in this case.

1 With respect to Mr. Hodson he testified as a
2 30(b)(6) answering questions about AWP, government
3 reimbursement. In addition the senior vice president for the
4 division whose comments at issue in this case, a guy named Don
5 Robertson testified that Mr. Hodson was responsible for
6 approving sales and marketing plans for his division. So he's
7 directly involved in the decision making process that is
8 implicated in this case. Your Honor offered an out for the
9 defendants to provide 30(b)(6) testimony. They didn't prepare
10 their witnesses to address any of the specific factual
11 knowledge that these witnesses have.

12 In addition, Judge Saris indicated that in upholding
13 Your Honor's ruling that she thought that perhaps these
14 depositions could go forward or should go forward I should say,
15 indicate--

16 THE COURT: Compromise, five written deposition
17 questions.

18 MR. WINCHESTER: Thank you, Your Honor.

19 MR. GOBENA: Your Honor, if I can - I know Your Honor
20 ruled, but if I could briefly ask for a moment of your
21 indulgence. We did a written deposition before and it, you
22 know, and we fought about the result mostly because it was -
23 and it's not any, I'm not casting any aspersion on counsel but
24 this was, basically it was treated as an interrogatory. You
25 know we're willing to go to where these witnesses are. if you

1 want to put severe limits on the questioning, we can do an
2 hour or two with these witnesses on specific documents, but I
3 think it's important to have the live, in-person testimony
4 because high level people in this case have been questioned
5 even on the government's side.

6 THE COURT: Five written deposition questions.

7 MR. WINCHESTER: Thank you, Judge.

8 THE COURT: All right, that takes us to Document--

9 MR. WINCHESTER: The home stretch.

10 THE COURT: Yeah. We're not finished. All right.

11 MR. WINCHESTER: No, the next one, Judge, I think
12 you're at the last one here.

13 THE COURT: Right.

14 MR. WINCHESTER: Which I think is--

15 THE COURT: I'm jumping ahead.

16 MR. WINCHESTER: --5276.

17 THE COURT: Right, 5276 it is.

18 MR. WINCHESTER: Judge, this is our motion. It is
19 very discreet. There are two pieces of paper that we
20 inadvertently produced which are privileged documents, memos
21 directly from Abbott's in-house counsel to persons who asked
22 for that counsels advice, two documents out of about three
23 million pages here. The protective order in this case
24 specifically contemplates and both parties carefully wrote this
25 in to say if you inadvertently produce privilege documents,

1 that's not going to affect the waiver. It says right there,
2 not going to affect a waiver. Here's what you have to do, make
3 a formal written request to get the documents back within 21
4 days of when you learn about them and if they were
5 inadvertently produced you get them back. And that is exactly
6 the situation here. These documents slipped through and were
7 made in a production that we made in about November of 2007
8 having to do with the former Abbott Home Infusion Services
9 Group. They're two copies basically of the same document
10 really. And we learned about this inadvertent production in
11 March of this year when the government, and it was actually
12 counsel Ms. St. Peter-Griffith here, tried to mark the
13 documents as exhibits to use with our 30(b)(6) witness on
14 compliance. And she tried to put them in, and the defense
15 counsel at the deposition immediately snapped those documents
16 back and the government to its credit tore the documents up
17 right sitting there, did not use them. Within 21 days, in fact
18 19 days later we submitted a written request to say give us
19 those documents back. Put them in a sealed envelope if we're
20 going to fight about it, and that's where we are. So there's
21 no question that we have complied exactly with what the
22 protective order says and there's no waiver.

23 The three issues the Court has to consider here was
24 this production of these two documents out of three million
25 inadvertent versus being purposeful or somehow grossly

1 negligent. Second, are the documents privileged? And third,
2 did we comply with the protective order? I think as I've just
3 said taken them adversely we certainly have complied with the
4 protective order. To the question of privilege, Your Honor I
5 believe has these documents as part of the government's
6 in-camera submission. We don't need to talk about the
7 substance of them in open court here, but you can pretty
8 clearly see there is a request for legal advice going from two
9 business people to the Office of General Counsel and you get a
10 responsive memo back that says here is my legal advice on your
11 questions. I don't think there can be a dispute that this is
12 not privileged communication or that that is a privileged
13 communication.

14 So the real issue is was this an inadvertent
15 production, and the cases that we've provided the Court make
16 very clear this issue of inadvertent production is the vain of
17 these huge cases where you're talking about thousands, millions
18 of pages to be produced and the Court's make clear where you've
19 got reasonable steps in place to make sure this doesn't happen.
20 When it does it's inadvertent. And we've given the Court the
21 only record that there is on this through the declarations that
22 tell you the way we do this is a two-tiered process. The first
23 tier are people who are basically conducting the clerical or
24 mechanical task, you don't do privilege determinations. What
25 you do is mark every last document that has a lawyer on it,

1 communication to or from a lawyer. Don't try to decide for
2 yourself is it privileged, just mark it. And all of those go
3 to a second tier of more senior counsel who review those and
4 make the actual determination on privilege. We either produce
5 them or we log them on our privilege log.

6 In this case what happened was for these two copies
7 of this same document for reasons unbeknownst to me, those
8 documents accidentally were not marked by the first tier
9 reviewers so they never got to the second tier reviewers. And
10 that as all the cases we've presented make clear is an
11 inadvertent production. We clearly did not produce these
12 documents purposefully. And this is the subject of all the
13 waiver cases that the government tries to put forward which
14 says well you can't offer the document in support of some
15 theory of your and then hide the rest. Well we didn't do that.

16 We're not offering these documents in support of any
17 theory we have. These were documents that slipped through in
18 response to a number of the government's inquiries. There was
19 no purpose to this nor in light of the cases that we've shown
20 can there be any suggestion of a gross negligence here in light
21 of our procedures. So we complied with the protective order.
22 We've got privileged documents. They were inadvertently
23 produced and we'd like them back.

24 MS. ST. PETER-GRIFFITH: Your Honor, what my brother
25 counsel for Abbott I think omitted from the discussion is that

1 there was a waiver and there has been a waiver on this
2 subject matter. That deposition that was at issue was their
3 lawyer, Abbott's in-house lawyer who they put up as the
4 30(b)(6) representative on compliance issues. Surrounding his
5 deposition Abbott produced more than 30 documents that were
6 generated by counsel and were using it affirmatively in this
7 case to show their compliance measures.

8 This particular document, we don't have to get into
9 the subject, Your Honor, but it's our position that this
10 particular document goes to that subject matter and it is
11 impermissible for Abbott to pick and choose which documents
12 they're going to waive attorney-client privilege on and produce
13 30 of them and say, look how good we were as corporate
14 citizens, and then withhold those that may not be as favorable
15 to them. That is a waiver. It's - waiver on the subject
16 matter. It is impermissible. They put their lawyer up, Your
17 Honor, as the 30(b)(6) rep to talk about compliance.

18 Numerous witnesses have said they relied upon
19 in-house counsel to determine whether their practices of
20 whether they were in compliance. The general counsel for this
21 case wore a separate hat of being the compliance officer. And
22 with regard to the issue of are these documents privileged,
23 Your Honor, that is a burden that Abbott has and frankly it's
24 difficult to understand. These particular documents weren't in
25 the, didn't come from the General Counsel's Office. They came

1 from contract files and they appeared to be advice consistent
2 with the role of a compliance officer as opposed to a general
3 counsel.

4 Additionally, with regard to the issue of
5 inadvertence, Your Honor, we understand there's been a mass of
6 production here, but one of the reviews these particular
7 documents twice missed attorney review - they all, attorney
8 reviewed for privilege. They also missed a review for
9 confidentiality designations which the protective order in this
10 case is very, very clear. These documents were stamped
11 confidential and it's our position that it rises to the level
12 of gross negligence if there's a, if a document is reviewed for
13 confidentiality as carefully as it should be and it, you know,
14 the privilege character isn't identified. But the real big
15 issue here, Your Honor, is the issue concerning the waiver of
16 the subject matter with regard to compliance matters and the
17 production of documents.

18 THE COURT: All right, it's after one. I'll think
19 about this over the lunch period, and I'll see you at two
20 o'clock and then according to my schedule we have 5356, 5692
21 and the one that was added this morning, Mr. Duffy, is?

22 THE CLERK: 5356, 5692 was the one added this
23 morning. And 5609 might still be up there as well.

24 UNIDENTIFIED: Actually that'll be resolved.

25 THE COURT: No, we dealt with 5609.

1 THE CLERK: Resolved.

2 THE COURT: All right, so two o'clock. I do have a
3 criminal matter at 2:30 so we'll do our best.

4 RECESS

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A F T E R N O O N P R O C E E D I N G S

THE CLERK: Okay.

MR. WINCHESTER: Before you rule on this privilege document motion could I address a couple of things that counsel brought up in her argument?

THE COURT: If I'm ruling in your favor does it matter?

MR. WINCHESTER: Not at all.

THE COURT: All right. Allowed. I had made that determination before I came out.

MR. WINCHESTER: Excellent. Thank you, Judge.

MS. ST. PETER-GRIFFITH: Thank you, Your Honor.

THE COURT: Okay, that leaves us now with as I see it 5276 next or did, is that the one I that I just--

MR. WINCHESTER: Well that's the one you just did, Your Honor. That was the privileged document.

THE COURT: Okay. So then - Mr. Duffy, next time you have to put these in numerical order.

THE CLERK: I will, Your Honor. The last to the next one is 5642.

THE COURT: Right.

MR. HENDERSON: I have 5357. That's actually a memorandum.

THE COURT: No, 5356.

MR. HENDERSON: Yes. That would be the motion.

1 THE COURT: Yeah, that's the next one.

2 MR. HENDERSON: Shall I proceed, Your Honor?

3 THE COURT: You may.

4 MR. HENDERSON: Okay. This is the government's
5 motion for a protective order in the Day case with respect to
6 some 30(b)(6) topics. And I would suggest to Your Honor that
7 we do have to keep in mind the veritable orgy of discovery
8 that's been going on on the part of the defense side. They've
9 taken about 50 days of depositions of government employees, 21
10 of Office of Inspector General employees questioning
11 extensively about these various OIG reports. And there was a
12 list of 76 reports that were produced early on in the case
13 along with work papers for a great many of them. And so what
14 I'm suggesting, Your Honor, is we have to apply some rule of
15 reasonableness.

16 The first two topics that are the subject of our
17 motion, I'm going to group them according to categories, are
18 topics 29 and 51 which relate to some, to OIG reports. Topic
19 29 deals with a 2001 Office of Inspector General report
20 relating to AID drugs, drugs for treating AIDS and specifically
21 that topic requests, focuses on a chart. And this chart, Your
22 Honor, is a very simple explanation of drug pricing. And you
23 look at it and why on Earth Day wants to ask about this chart
24 is beyond me. If you look at the chart all it has is the most
25 basic information that starts with for example manufacturers'

1 established wholesale prices and average wholesale prices and
2 wholesale acquisition costs. Well, there's no dispute about
3 that, Your Honor, at least not with respect to Day. Day has
4 admitted in its testimony and answers to interrogatories that
5 it submits its wholesale AWP's and WAC prices to the compendia
6 with the expectation that these compendia will publish them and
7 in fact they do publish them. And in the one instance where
8 one of these publishers didn't, Day promptly sued the company
9 and forced them to publish exactly what Day was reporting.

10 So what they're going to ask the OIG about the fact
11 that on this chart it says that manufacturers set these prices
12 is beyond me and particularly when they're, what they're asking
13 about is the drafting and preparation of this chart and its
14 circulation. This was public, you know, this was out there on
15 the web so it was circulated to the entire world. And so I
16 suggest we're just off the deep end here when we're asking
17 about something like this chart which just talks about - the
18 next piece on the chart is states that wholesalers are the
19 middlemen who buy drugs from manufacturers and sell to
20 retailers. Now why do we need to have testimony from an OIG
21 person who apparently drafted this thing about what he did to
22 prepare this and drafts of it. I just think, Your Honor, there
23 has to be a limit. The - so that's really the gist on that
24 particular topic. They should be focusing on, and there has
25 been lots of focus on the drugs that are at issue in these

1 cases and many, many OIG reports and studies focusing on the
2 differences between actual acquisition costs and published
3 prices.

4 THE COURT: All right. Why shouldn't I allow this
5 portion of the motion?

6 MS. REID: Good afternoon, Your Honor. My name is
7 Sarah Reid. I'm with Kelly Dwyer and representing Day. I
8 think it's the first time I've had the honor of being in your
9 courtroom.

10 THE COURT: We welcome you.

11 MS. REID: The, just as the outset, there's been a
12 lot of discovery. There has not necessarily been huge amounts
13 of discovery by Day. They have of course have participated in
14 the Abbott discovery but I don't think Day has in any way
15 abused or been overbroad in its discovery. It's tried to be
16 focused. And the reason that this particular report is of such
17 interest and the reason that we designated it as a topic is
18 because it is a study by the Chicago office of the OIG which
19 demonstrates exactly the understanding of how the priced points
20 worked in the market for all drugs. And the report itself
21 specifically refers to the DOJ and WP project. It refers to
22 the drugs that were under the DOJ AWP noting that they weren't
23 any of the AIDS drugs. And the chart in question, I don't know
24 if Your Honor had an opportunity to look at, is so interesting
25 because it says exactly what the defendants have said, it

1 compares the, you know, what the list wholesale acquisition
2 cost is but notes the actual selling price is the AMP. Then at
3 that wholesalers it says the list price is the average
4 wholesale price but the actual selling price is actual
5 acquisition cost.

6 So from our point of view we don't see a lengthy
7 deposition but we would like to understand what they looked at,
8 the sources, facts that they looked at that led them to put
9 together this chart, this report which so directly demonstrates
10 an understanding of how the market which is in complete
11 contract to what they've alleged against us.

12 THE COURT: I'll allow a three hour deposition.

13 MS. REID: Thank you, Your Honor.

14 MR. HENDERSON: With respect to topic No. 51, Your
15 Honor, I think you've already resolved this. This relates to a
16 Office of Inspector General report dated January of 2008 and
17 this was the subject of a request by Abbott for work papers on
18 that. Day wants to take the deposition, a 30(b)(6) deposition
19 on this and I suggest the same principles apply and the Court
20 should deny or should allow our motion for protective order on
21 that.

22 THE COURT: Same ruling.

23 MR. HENDERSON: Very well. The next two topics are
24 topics No. 32 and 33 and these request 30(b)(6) testimony on
25 the extensions of time that the government requested and

1 obtained in the Qui Tam cases while they were under seal.
2 The motions and the supporting memoranda and the Courts
3 allowances of the motions have been unsealed and the defendants
4 have them. They apparently are not happy with those
5 explanations and would like to understand perhaps my subjective
6 reasons if they differed from what was stated. I'm sure they
7 would like to probe my views on whether I knew something
8 different or whether I thought something different than what I
9 wrote. But I suggest, Your Honor, this is off limits.

10 THE COURT: No, if you want to have a conversation,
11 if you want to have a conversation you can step out of the
12 courtroom.

13 PAUSE

14 MR. HENDERSON: May I proceed, Your Honor?

15 THE COURT: You may.

16 MR. HENDERSON: I suggest that this type of 30(b)(6)
17 deposition is--

18 THE COURT: The government's motion to this aspect of
19 the - the government's request is allowed to this portion.

20 MS. REID: Your Honor, I understand that you've
21 ruled. I just want to note on the record that it is, the
22 requests were made in any effort to look at and construct the
23 record to demonstrate the prejudice as a result of the nine
24 year delay in this matter.

25 THE COURT: My ruling stands.

1 MS. REID: Thank you.

2 THE COURT: You're welcome.

3 MR. HENDERSON: The next two topics, topics 40 and
4 42, request 30(b)(6) deposition testimony about how and when
5 the government learned about the fraud that's alleged in the
6 complaint. And Judge Saris has rejected a statute of
7 limitations argument. So this type of testimony is not
8 relevant to a statute of limitations defense because Judge
9 Saris has said that basically on the statute Day's arguments
10 can't prevail.

11 What Day argues I think is that they have a due
12 process argument about the, what they say is a long delay
13 between the originally filing on the Qui Tam complaint against
14 Day which was added in 1997 and the date when the government
15 intervened in 2005. And I suggest that this due process rubric
16 is simply an excuse for a fishing expedition into the
17 government's internal investigation. The factual information
18 about what the government learned is, well from Day's
19 perspective they say all these OIG reports are what the
20 government learned about the, what's alleged in the complaint.

21 In addition there is the issue about the specifics
22 that relate to Day, the evidence that Day was intentionally
23 reporting false pricing information with the intended purpose
24 of increasing reimbursements under the Medicare and Medicaid
25 program. Day knows full well that the evidence that we have on

1 that came from Day. They know they produced their internal
2 documents and when. And the evidence came from testimony that
3 was developed in the Qui Tam litigation brought in the state of
4 Texas and those depositions. They know full well exactly when
5 the government learned of their own conduct because that was
6 disclosed in their production of documents, in the testimony
7 that their current and former employees gave in the Texas case
8 and then finally when they produced their transaction data to
9 us, actually we got it slightly in advance from Texas in about
10 2003. That's when we could look at their own prices and
11 determine that their average actual selling prices were no
12 relation whatsoever to the AWP's that they were reporting. So
13 they know full well about what the government learned about
14 their specific conduct and when. And they have this other
15 layer up here of all these OIG reports.

16 So what I'm suggesting, Your Honor, is that this,
17 these 30(b)(6) topics about how and when the government learned
18 about the fraud, in this situation where there's no statute of
19 limitations issue it's going too far. We're just--

20 THE COURT: Okay, let me hear from Day on this one.

21 MS. REID: Thank you, Your Honor. Let me just
22 clarify, the thing that Day does not know and the reason that
23 this is such an issue for us is we are still unclear as to when
24 it is CMS first knew allegedly of the actual prices that were
25 paid by Day. There is OIG reports in 1995 invoices with Day

1 invoice prices and that is two years before we were added to
2 the relators Qui Tam complaint, a year before the complaint
3 itself is filed. What we want with this 30(b)(6) testimony, or
4 we will take it in a written answer, is somebody to commit as
5 to when it is, the government's position is that they first
6 learned of this supposed fraud. And there has been everything
7 kind of around it but we still don't have an answer to that
8 and, you know, we have of course examined Ven-A-Care on that as
9 to what they gave the government. But I think that the other
10 half of this is what the government, in that critical time
11 period what their position is on what they knew.

12 THE COURT: All right. I'll permit you to have it to
13 the extent of five written deposition questions and in the
14 event you're not satisfied with the responses to those
15 questions you may renew your request.

16 MS. REID: Thank you, Your Honor.

17 MR. HENDERSON: Let's see, a few more topics. Topic
18 60 asks for 30(b)(6) testimony on whether the United States
19 contends that the usual and customary price submitted by any
20 provider to Medicare or Medicaid for any Day subject drug is
21 false or fraudulent. Now the usual and customary, I'll give
22 you a little background, under the reimbursement methodology
23 that most states employ, they will reimburse based on the lower
24 of several different components.

25 One is the estimated acquisition cost which is

1 normally AWP or AWP minus 5% or 10%, whatever the state sells
2 or another component may be a so-called federal upper limit
3 which is a cap, and another component is this usual and
4 customary charge that the pharmacist will submit on the claim
5 form. And the state methodologies typically provide to pay at
6 the lower of any of these three different components.

7 Now, we're alleging that the estimated acquisition
8 component which includes AWP minus 5% or whatever the state
9 does, that's where the fraud is because the defendants submit
10 they reported phony AWP prices or in some cases WAC prices.
11 We're not making, our complaint makes no allegation about usual
12 and customary charges. And I don't know why Day is asking
13 this, I suspect it's because they think that if they lock us
14 into a position one way or the other, yes or no, either way,
15 they have some theory, some clever theory for saying, ah-ha,
16 gotcha, the government can't prove its case.

17 But I suggest, Your Honor, where it's not an element
18 of our case, this usual and customary chart is not an element,
19 we don't allege fraud. If it happened, it was by some other
20 party. If some pharmacist out there submitted a phony usual
21 and customary price, that's the pharmacist's issue, not ours.
22 We haven't developed proof in the case of this. We don't
23 anticipate developing proof. It's conceivable if Day comes up
24 with some theory that is a bit of a surprise we may have to
25 respond to it. So I don't want to take any position on this.

1 I don't know what they've got up their sleeve, but I can say
2 it's not an element of our case. We don't anticipate any proof
3 and we don't have any position on this.

4 THE COURT: All right. Why do you need it?

5 MS. REID: The reason is, Your Honor, and Mr.
6 Henderson's heard this argument before, the government is well
7 aware, the usual and customary charge is ordinarily defined by
8 various states as to what goes into it. It has to be certified
9 as true and accurate by the pharmacist. And then if it comes
10 in at say \$20 and the reimbursement formulas give you something
11 less than that under an AWP methodology, then you pay the
12 lesser amount. The point is the usual and customary charges
13 are certified as on this accurate subject to the penalties of
14 perjury et cetera, et cetera, and our issue for the government
15 is, is their position that the usual and customary charges are
16 false and fraudulent or that they aren't.

17 Now, if they want to give us the answer to that as a
18 contention interrogatory, I will take that, I mean as a written
19 response. But I think that we're entitled to know their
20 position on that. This is not a surprise. They have known
21 that this is an issue.

22 THE COURT: All right. How many - can one contention
23 interrogatory do it?

24 MS. REID: Yeah, I think so.

25 THE COURT: All right. Allowed to that extent. All

1 right, thank you.

2 MR. HENDERSON: Fine. Finally, two more that are
3 related. These are the 30(b)(6) topics 61 and 62. Let me just
4 make a note of Your Honor's ruling on the topic, was it a
5 contention interrogatory?

6 THE COURT: Uh-huh, one.

7 MR. HENDERSON: Topics 61 and 62 ask for 30(b)(6)
8 deposition testimony on the compliance guidelines issued by
9 Office of Inspector General in 2003. These were guidelines
10 that OIG issued providing guidelines for pharmaceutical
11 manufacturers to use and consider in having an effective
12 compliance program to not run afoul of the law. And these
13 guidelines also talked about the obligation to submit truthful
14 pricing information relied upon by state Medicaid and federal
15 Medicare programs. And the defendant Day specifically focuses
16 at least on one of its topics on, "the definition of AWP as
17 used in the OIG compliance guidelines," which is a, it's a
18 false characterization because the guidelines have no
19 definition of AWP. They don't define the term. They make
20 observations about it as have been made for many years. Lots
21 of observations about AWP, at least when it's published,
22 doesn't represent, it doesn't reflect actual acquisition cost
23 so I say because of the conduct of the defendants, Your Honor.
24 But in any event there's no definition of AWP in those
25 guidelines. And the guidelines were as you can well imagine

1 because they talk about compliance with the law, they were
2 written by counsel for Office of the Inspector General. And so
3 the defendants clearly want to probe the legal thinking and
4 presumably challenge some of the conclusions in those
5 guidelines and have a debate with counsel for Office of
6 Inspector General about what does AWP mean, what did you mean
7 subjectively when you wrote this? What did you intend when you
8 wrote that?

9 And I suggest, Your Honor, that in the context of a
10 Federal Register notice that sets forth guidelines for
11 companies to follow, it's really just inappropriate to start
12 that type of probing the mentality of counsel who prepared that
13 sort of really a legal document to guide companies in complying
14 with the law. Boy, if every agency counsel who wrote something
15 like that had to be subject to a deposition, we wouldn't be
16 issuing complaint.

17 THE COURT: It would keep the U.S. Attorney's Office
18 in business.

19 MR. HENDERSON: Yes, we'd be business defending a lot
20 of depositions.

21 THE COURT: On behalf of Day?

22 MS. REID: This seems to me to be similar to what
23 Your Honor's ruled, similar with the Abbott 30(b)(6) issues on
24 the definitions of AWP. This is part and parcel on that whole
25 line of inquiry of how things evolved over time. And it seems,

1 you know, I don't want to debate law, but I want to
2 understand, you know, the context of this whole section on
3 average wholesale price, what you're supposed to do and, you
4 know, whether it was used. So that was the reason for it, and
5 I think that we're entitled to, you know, reasonable amount of
6 time to question on that perhaps as part of the Abbott
7 30(b)(6).

8 THE COURT: What's reasonable? What's reasonable?

9 MR. HENDERSON: Oh, what's reasonable--

10 THE COURT: I mean, you're--

11 MS. REID: On this?

12 THE COURT: No, I'm asking Day. She just asked, said
13 a reasonable time so I'm asking her what's reasonable.

14 MS. REID: On this? I would think we could do this
15 in a couple of hours. I'm not looking for a full day on the
16 OIG--

17 THE COURT: Limited to two hours.

18 MR. HENDERSON: That's it on that particular motion.

19 MS. REID: I'm afraid there are more.

20 MR. HENDERSON: Oh, are there? I'm sorry, I--

21 THE COURT: Are you waiving them?

22 MR. HENDERSON: I took, no, I took the red eye back
23 from California last night and I haven't slept a wink since the
24 day before yesterday. So I may have missed them. Perhaps--

25 MS. REID: Yeah, if you'd like I can go through them.

1 MR. HENDERSON: All right. Since I've blown it in
2 that respect, I'll allow counsel for Day to start the argument
3 first on the remaining topics.

4 MS. REID: Okay. Basically, Your Honor, these are
5 topics 34, 35, 36, 37, 38 and 41. And I'll give you an
6 example, they basically are asking for the false statements and
7 fraudulent statements made by Day that led to the claims in the
8 complaint. Instances of Day actively promoting the spread, the
9 basis for the allegation that Day knew that it's false price
10 reporting would cause customers to submit claims for
11 fraudulently inflated reimbursement and generally the factual
12 basis for the allegation of fraud against Day.

13 The objection by the government is that it was too
14 broad, this is mini-trial. I think that we are entitled to
15 have a 30(b)(6) witness answer this. We have asked for it in
16 interrogatories and have not gotten real answers. So at this
17 point I just need to be able to question and, you know, get the
18 government's position on these points.

19 MR. HENDERSON: Your Honor, normally this type I
20 think of questioning would be okay. If the government had gone
21 out and gathered independent factual information and documents
22 from third parties, it would be okay to find out what evidence
23 the government has gathered. In this case all of the evidence
24 about Day's conduct has come from Day. It has come from
25 depositions. It has come from documents generated by Day. So

1 what we would have to do is we'd have to go through the
2 several million pages of documents that Day has produced and
3 pick out the ones that we intend to use as trial exhibits. And
4 we'd have to say, okay, here are the ones that we're going to
5 rely on and then we'd have this dispute about just how do you
6 interpret this and the other thing?

7 THE COURT: Well eventually you'll have to do that.

8 MR. HENDERSON: That's right, we'll eventually have
9 to do that. And likewise we'll have to identify which of the
10 employees we're going to call to testify, but I think at this
11 stage of the game we don't have to do that. This is not trial
12 ready yet. We don't have to identify each page of each
13 deposition that we interpret as saying you're marketing the
14 spread here. We don't have to pull out each and every document
15 and say here's the line where we think this shows that you're
16 marketing the spread. I don't think we have to do that. If we
17 had independent evidence, fine, but we don't. It all comes
18 from Day documents and Day testimony.

19 MS. REID: Your Honor--

20 THE COURT: All right.

21 MS. REID: I don't - they must have had something
22 when they filed suit in the Ven-A-Care. I mean there had to
23 have been some reason. They didn't, you can't just bring a
24 complaint and then say after the fact when I finally got your
25 documents I knew there as a fraud.

1 MR. HENDERSON: We had, certainly we had Day
2 produced to us during the investigation a million or so pages
3 of documents and we had testimony from the Texas litigation,
4 all of Day employees. So, yes, we had information before we--

5 THE COURT: I'm going to allow the government's
6 motion on this category.

7 MR. HENDERSON: Thank you.

8 MS. REID: I have one question on that and I just
9 raise it because it's an issue that we're in a real bind.
10 We're at the end of discovery. You know, if we're not doing
11 this we've asked the interrogatory responses. The answers, the
12 interrogatory responses are very sparse. They say, well, we
13 may supplement it, discovery is ongoing. I would like to have
14 a date of when supplements to interrogatories have to be done
15 so we can have some finality on this, Your Honor, for summary
16 judgment are filed. I'm prepared to--

17 THE COURT: Well, do you have a summary judgment
18 date?

19 MS. REID: Yes. It's the end of, I think beginning
20 of June we have to file our initial briefs.

21 MR. HENDERSON: I guess the problem I have, Your
22 Honor, is that's not before the Court. They haven't moved to
23 compel on any interrogatories. I've haven't looked at them.
24 We haven't discussed them.

25 THE COURT: All right, premature at this time.

1 MS. REID: Your Honor, do you want me to move to
2 compel or do we, I mean, I haven't--

3 THE COURT: Sit down and see what you can do. Have a
4 meet and confer and if you have to move to compel, you have to
5 move to compel.

6 MS. REID: I don't want to.

7 THE COURT: All right.

8 MS. REID: Thank you.

9 THE COURT: All right, anything else?

10 MR. HENDERSON: We have another motion. This is--

11 THE COURT: Okay, well that's - in this present
12 motion?

13 MR. HENDERSON: I think we've covered everything.

14 THE COURT: All right. There are two remaining
15 motions, 5642 and 5692. You have two choices. We can recess
16 now. I have to deal with this criminal matter cause I may have
17 to take testimony. And I'll hear you when I'm finished,
18 probably a half hour, 40 minutes or I can take them on the
19 papers and give you an electronic ruling in the next day. If
20 you want oral argument, I'm happy to hear it but I'm going to
21 deal with the criminal case.

22 MR. HENDERSON: I'd be happy to submit them on the
23 papers. The only thing about one of them is this motion to
24 take the deposition of a prisoner.

25 THE COURT: Yeah.

1 MR. HENDERSON: I submitted an order which had a
2 date in it. I've now talked about doing this on the 15th which
3 is the only day available. It's the last day of discovery, but
4 I haven't, since my travels I've just gotten back from
5 California, I haven't been able to talk to prison authorities
6 to double check that they can do it on that short notice. So
7 my only hesitation is if Your Honor decides to allow that
8 motion the form of the order and whether we can do it by the
9 15th and if not I would ask for leave to take it--

10 MS. REID: Your Honor, I'm happy to stay and argue
11 this and--

12 THE COURT: All right, so we'll take the break and we
13 can deal with the criminal matter.

14 MS. REID: Thank you, Your Honor.

15 THE COURT: All right.

16 RECESS

17 THE CLERK: Okay, resuming on the record AWP MDL
18 litigation 01-12257 and others.

19 THE COURT: All right, resuming on the record.
20 Mr. Henderson?

21 MR. HENDERSON: Thank you, Your Honor, George
22 Henderson for the United States. With the Court's permission
23 and at the request of Mr. Daley who has a schedule issue with a
24 flight back, I'd ask that we address No. 5692--

25 THE COURT: When I was in the justice department they

1 tortured, the taught people torture the other side flight
2 schedule.

3 MR. DALEY: Your Honor, this one was added just this
4 morning so we, Mr. Winchester and I would be done but for them
5 adding this and we're fine to have it--

6 THE COURT: Sure.

7 MR. DALEY: --addressed today but if the Court can
8 indulge us that'd be great.

9 THE COURT: Sure.

10 MR. DALEY: Thank you.

11 THE COURT: No problem.

12 MR. HENDERSON: And I do recognize it was added late
13 and the government did not give advance warning to defense
14 counsel so if they have any objections I can understand but
15 I'll proceed, Your Honor, in any event.

16 In the motion that is Document No. 5692 the
17 government has requested--

18 PAUSE

19 MR. HENDERSON: The United States has requested a
20 protective order with regard to a deposition of Robert Reed.
21 Robert Reed was the former pharmacy program administrator for
22 the state of Ohio Medicaid program. The United States has
23 informed before, I'm trying to recall what the date of its
24 letter was, but we informed the defendants in a letter dated
25 November 12 that the United States would not be pursuing claims

1 for the federal share of the Medicaid expenditures for drugs
2 reimbursed through the Ohio program. So Ohio is out of our
3 picture. And we have a discovery deadline of the 12th. This
4 really from our perspective is irrelevant and we think the
5 parties should be focusing on relevant discovery in the
6 remaining time left and not trying to take a deposition of a
7 former Medicaid administrator for a state that's not an issue.
8 That's the short and simple of our argument, Your Honor.

9 THE COURT: All right.

10 MS. REID: Your Honor, I will speak first and let Mr.
11 Daley comment because it is Day that filed the opposition. I
12 am not the person that was in charge of this whole issue, but
13 based on what I know from my partner who was it was always
14 expected that Mr. Reed would testify. He was to be the
15 30(b)(6) witness for Ohio. He is very knowledgeable. He is a
16 person who was on the pharmacy technical advisory group of the
17 National Association of State Medicaid Directors. The PTAG
18 group is a group that interacts directly with CMS on the
19 Medicaid side. He is very knowledgeable about state plans,
20 about pricing and--

21 THE COURT: Do you intend to call him as a witness?

22 MS. REID: Your Honor, this is not - given everything
23 that's going on, taking this man's deposition which he is
24 prepared to give, we're talking about one day, it's scheduled,
25 and we've got it preserved because who knows given the passage

1 of time where we'll be. The government has the resources.
2 They're, you know, pushing for their depositions when they want
3 them. This is an important deposition. This man is very
4 knowledgeable. It's really quite amazing that they basically
5 yanked their Ohio Medicaid damage claim rather than let him
6 testify. So I think at this point, you know, there's really no
7 grounds other than the fact as I hear Mr. Henderson enunciate
8 it a possible burden. There's no question it's relevant. I
9 think it should just be allowed to proceed.

10 THE COURT: Mr. Daley?

11 MR. DALEY: Judge, I agree with everything counsel
12 for Day stated. I just want to explain why I'm standing up.
13 The motion that they filed only seeks to quash Day's notice but
14 we also subpoenaed them. I didn't think the Court would be
15 very happy with me if I just laid in the weeds today and said,
16 well, whatever you ruled for them doesn't matter to me cause
17 we've subpoenaed it too so it seems to me we have an--

18 THE COURT: Are you going to do it at the same time?

19 MR. DALEY: Yes, absolutely. And all we have is we
20 have a letter from assistant United States attorney saying
21 we're going to drop our claims. I'm not even sure what that is
22 for Ohio but as counsel was indicating this is a witness who--

23 THE COURT: The claims have not actually been
24 dropped?

25 MR. DALEY: No, there's just a letter which I'm not

1 even sure what that is so--

2 THE COURT: Motion for protective order is denied.

3 MR. DALEY: Thank you, Judge.

4 THE COURT: That leaves us with one which is 5642.

5 MR. HENDERSON: Yes, Your Honor. And despite my
6 sister's comment about all the discovery that the United States
7 wants we've cross noticed one deposition of Day. We've taken
8 two depositions of former Day salesmen and we have one more
9 scheduled. So we've cross noticed one 30(b)(6), three
10 30(b)(1)s. Now we'd like to take one more of a former Day
11 sales employee. And as the documents indicate attached they
12 certainly strongly suggest that he was marketing the spread on
13 Day products. Day says this is duplicative, the documents
14 speak for themselves. I suggest not, Your Honor. Documents of
15 this sort never completely speak for themselves and it is the
16 memory of the witness that's important.

17 We deposed one other sales representative. He was,
18 he met with counsel for eight hours the day before and on the
19 day of the testimony remembered nothing about what he had done.
20 We deposed another sales rep. subsequently. He did have some
21 rather significant memory of his marketing activities and gave
22 some important testimony on that. So I don't think it's a
23 forgone conclusion what any particular witness may or may not
24 remember or know. And certainly Judge Saris has indicated that
25 marketing the spread is conduct that is highly relevant to this

1 case. So I would suggest that this is really a no brainer,
2 Your Honor. We should be entitled to take this dep--

3 THE COURT: And he's in custody?

4 MR. HENDERSON: He's in custody and he was, I think
5 he pled guilty to sexual assault but the fact that a man's been
6 committed, been found guilty of a crime is not a basis for
7 saying he's incompetent to testify as I noted in my paper, Your
8 Honor.

9 THE COURT: How different from your brothers on the
10 criminal side of the U.S. Attorney's Office.

11 MR. HENDERSON: I think I'm being quite consistent,
12 Your Honor. The *Connolly* case is a good example where the
13 government relied on the testimony of criminals who had pled
14 guilty to dozens upon dozens of murders and they were allowed
15 to testify.

16 MS. REID: Your Honor--

17 THE COURT: On behalf of Day.

18 MS. REID: On behalf of Day.

19 THE COURT: Why shouldn't I grant this motion?

20 MS. REID: Okay. There are two concerns, Your Honor.
21 First, as Mr. Henderson has alluded to, you know, there's the
22 issue of is it duplicative and what, you know, whether we're
23 going to elicit on a weighing test significant testimony.
24 There were 20 sales representative in this time period.
25 They've talked to two so far. They've contacted many. There

1 are three more that are going to be taken I think in the
2 California MDL which will in essence translate back into here.
3 And so the question is is Mr. Ricks incarcerated in Colorado
4 state prison, of sufficient importance that, you know, we
5 should order his deposition and--

6 THE COURT: How much time do you need with him, Mr.
7 Henderson?

8 MR. HENDERSON: One day.

9 MS. REID: The other issue that I have and I think
10 it's a more serious issue than perhaps my brother counsel has
11 indicated that Mr. Ricks last worked for Day in 1996. He was
12 probably among his first jobs. He left. There's been no
13 contact with him since then by the company. We had a heck of a
14 time finding him you can imagine when we found him what we
15 thought, but when you look at what he did and what was said at
16 his sentencing in 2005 in Denver, he basically impersonated
17 various professionals in order to lure women and sexually
18 assault them. When he was let out on bond he then impersonated
19 a police officer, picked up prostitutes and sexually assaulted
20 them. At his sentencing he asked for probation so that he
21 could work with young adolescents. In summary--

22 THE COURT: Trust me, I've heard it all.

23 MS. REID: Yeah, you probably - the DA prosecuting
24 said the guy is a real con artist. That wasn't the DA, that
25 was a police officer. But the DA said he is a good liar, a

1 chronic liar who will say anything to get what he wants. And
2 that is part of my concern.

3 THE COURT: Well I'll let you have the deposition,
4 Mr. Henderson, but I don't think, I think you'll have
5 credibility issues with this witness but I'll let you have it.

6 MS. REID: Can we get the prison records for both
7 sides in advance just so that we have some basis to know if
8 there are medical issues because there's some hint of that in
9 the reporting too that he needs to be in treatment.

10 MR. HENDERSON: I think there's no hint of that at
11 all, Your Honor, and to try to enlist the local prison
12 authorities in document production--

13 THE COURT: Privacy issues--

14 MR. HENDERSON: Yeah.

15 THE COURT: --and everything else there. Only,
16 whatever records Mr. Henderson has in his possession should be
17 shared with Day, records regarding the defendant's
18 medical/penal status in the institution.

19 MS. REID: The other thing I would ask, Your Honor,
20 given the, you know, difficulty of getting a date if we could
21 have permission as we did for the government's witnesses, if we
22 could possibly do this after the holidays. We'll do it
23 promptly.

24 THE COURT: Yeah. Try to get it done by January 16th.

25 MR. HENDERSON: Yeah, with the Court's permission I'm

1 not sure I can get it done by the 15th, but I would like to
2 get in done in December.

3 THE COURT: Well get it done in January and you need
4 an order from me--

5 MR. HENDERSON: Yes.

6 THE COURT: --which I think is attached.

7 MR. HENDERSON: Correct. Except it has a date of
8 November 20 so can I submit a new one with a--

9 THE COURT: Submit a new one.

10 MR. HENDERSON: --proposed date.

11 THE COURT: I'll allow it tomorrow.

12 MR. HENDERSON: Just to be clear I think the, as I
13 interpreted the Court you want me to wait until January. We
14 have a lot going on in January. I'd like to get this done.

15 THE COURT: Well, if you can do it--

16 MR. HENDERSON: If I can get it done in December.

17 THE COURT: --but get it done by the end of January.
18 If you can do it next week, fine.

19 MS. REID: As long as--

20 MR. HENDERSON: Okay.

21 MS. REID: But we just need to coordinate the date.

22 THE COURT: You need to coordinate the date.

23 MR. HENDERSON: We'll coordinate and agree.

24 THE COURT: And any records you have about him,
25 medical records, probation records, criminal history records

1 are to be shared.

2 MR. HENDERSON: Yeah. We have none.

3 MS. REID: Thank you, Your Honor.

4 MR. HENDERSON: Thank you, Your Honor. I think
5 that's everything.

6 THE COURT: Okay. We stand in recess.

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CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.

/s/ Maryann V. Young

December 17, 2008

MARYANN V. YOUNG
Certified Court Transcriber
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